RECORD, CASE No. 13,876.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 259.

W. B. CARR, PLAINTIFF IN ERROR,

vs.

JOHN QUIGLEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED OCTOBER 22, 1889.

Inasmuch as since the Act of March 3d, 1891, chap. 517, 26 Statutes, p. 826, establishing the Circuit Court of Appeals, no appeal to this court lies, from such final judgment of said Supreme Court of the Territory of Arizona, the said appellees, now moves the Court that said appeal be dismissed with costs.

And inasmuch as rule 8, section 5, and rule 9, section 4, of this court requires that all citations shall be made returnable within sixty days from the signing of the same, the appellee now moves the Court that said appeal be dismissed with costs.

R. F. BRENT,

Attorney for William Keyser.

RECORD, CASE No. 13,876.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 259.

W. B. CARR, PLAINTIFF IN ERROR,

vs.

JOHN QUIGLEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED OCTOBER 22, 1889.

RECORD, CASE No. 13,876.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 259.

W. B. CARR, PLAINTIFF IN ERROR,

vs.

JOHN QUIGLEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

INDEX.

	Original.	Print.
Transcript from superior court	1	1
Complaint	3	1
Amended answer	5	2
Demurrer to amended answer	12	5
Order on demurrer	13	6
Decision and findings	13	6
Judgment	26	12
Notice of intention to move for new trial	28	13
Statement on motion for new trial	29	13
United States patent to Central Pacific Railroad Company, May 17, 1874	29	14
Facts proved by defendant	32	15
Order of United States surveyor general to E. H. Dyer, September 21, 1865	41	19
Decree of district court United States, northern district of California, in United States *vs.* Noriega *et al.*	43	20
Mandate of Supreme Court of the United States in United States *vs.* Noriega *et al.*	45	21

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 4, 1892.

	Original.	Print.
Order of district court United States, northern district of California, on mandate in United States *vs.* Noriega *et al.*	47	23
Testimony of Theo. G. Linton	49	23
Wm. J. Lewis	50	24
Letter of Commissioner of General Land Office to register and receiver at San Francisco, May 3, 1873	57	28
Extracts from book of instructions for surveys, &c.	74	36
Extracts from records of Land Office in case of St. Clair *vs.* Western Pacific Railroad Company	77	37
Testimony of Charles H. Chamberlin	85	41
Letter of Secretary Schurz to Commissioner of General Land Office, June 26, 1879	88	43
Letter of Commissioner of General Land Office to register and receiver, San Francisco, June 30, 1870	94	46
Admission by defendant	97	47
Stipulation as to facts	98	47
Affidavit of Thomas Brannan	101	49
Affidavit of Thomas Brannan *et al.*	102	49
Specifications of errors of fact	104	50
Second specification of errors in fact	106	51
Third specification of errors in fact	108	52
Specification of errors in law	108	52
Certificate of settlement of statement	111	53
Order denying motion for new trial	111	53
Notice of appeal	112	54
Stipulation as to substitution of attorneys	113	54
Stipulation as to record on appeal, &c.	113	54
Certificate of attorneys to record on appeal	115	55
Orders as to time to file briefs and submit cause, &c.	117	55
Submission	118	55
Judgment	119	55
Petition for rehearing filed	120	56
Rehearing granted	120	56
Continuance	120	56
Rehearing and submission	120	56
Judgment on rehearing	121	56
Opinion	122	57
Dissenting opinion	122	57
Assignment of errors	123	60
Bond	126	61
Citation (copy)	130	62
Writ of error	132	63
Clerk's certificate	135	64

1 & 2 In the Supreme Court of the State of California.

W. B. CARR, Plaintiff,
vs.
JOHN QUIGLEY, Defendant. } No. 9531.

Transcript on Appeal.

Shafter, Parker & Waterman, attorneys for plaintiff; Mich. Mullany, attorney for defendant.

Endorsed: Filed April 18, 1884. J. W. McCarthy, clerk, by John S. Kilsby, dep'y clerk.

3 In the Supreme Court of the State of California.

In the Superior Court of the County of Alameda and State of California.

W. B. CARR, Plaintiff,
vs.
JOHN QUIGLEY, Defendant. } No. 4316.

Complaint.

W. B. Carr, plaintiff in the above-entitled action, complains of John Quigley, defendant herein, and for cause of action alleges—

That, to wit, at the county of Alameda aforesaid, on, to wit, the 22d day of December, A. D. 1877, this plaintiff was the owner and seized in fee simple and possessed and entitled to the possession of that certain piece, parcel, or tract of land situate, lying,
4 and being in the said county of Alameda bounded and described as follows, to wit: The northwest quarter of section 19, township two south, range two east, Mount Diablo base and meridian.

That while this plaintiff was such owner as aforesaid and possessed and entitled to the possession of said lands and premises the said defendant did, to wit, at said county of Alameda, on the day and year last aforesaid, without right or title and against the will of this plaintiff, enter into and upon said lands and premises and did oust and eject this plaintiff therefrom, and ever since that day has unlawfully and wrongfully and against the will of this plaintiff withheld and still does so withhold possession thereof from this plaintiff, to his damage in the sum of one thousand dollars.

That the value of the rents and profits of the said lands and premises annually from the time of said defendant's said entry into and upon said lands and premises and while this plaintiff hath been and will be excluded therefrom is the sum of three hundred and twenty dollars.

Wherefore plaintiff prays judgment against said defendant for the restitution and possession of said lands and premises and the sum

of $1,000 damages for the withholding thereof and for $1,000, the value of the rents, issues, and profits thereof, and for costs of this action.

WM. IRVINE,
Plaintiff's Att'y.

(Duly verified.)

5 (Title of Court and Cause.)

Amended Answer.

Now comes the defendant, John Quigley, and by leave of court files this his amended answer herein and in answer to the complaint filed herein against him.

I.

He denies that the plaintiff was on the 22d day of December, A. D. 1877, or at any time or at all the owner of the land and premises described in the complaint. He denies that the plaintiff was seized thereof on said day or at any time or at all in fee simple or otherwise, and denies that the plaintiff was then or there or at any time possessed or entitled to the possession of said lands or any part thereof.

Defendant further denies that on said 22d day of December, 1877, or at any time he entered into or upon said lands without right or title so to do, and denies that on said day or at any time he ousted or ejected said plaintiff therefrom, and denies that since that day or at any time he has unlawfully withheld or now unlawfully withholds the possession thereof from the plaintiff.

And defendant further denies that the plaintiff has been damaged by said alleged withholding of the possession of said lands in the said sum of one thousand dollars or in any sum whatever.

And defendant further denies that the annual value of the rents and profits of said lands is the sum of $320 or any other or
6 greater sum than $50 per annum, and denies that the plaintiff is entitled to rents and profits for or on account of said lands in said sum of $320 per annum or any sum whatever.

II.

And for a second defense and further answer to the complaint in this cause the defendant says—

That he is informed and believes that the lands in the complaint described were patented to the Central Pacific Railroad Company as the assignee of the Western Pacific Railroad Company under a claim made by said company that the same had been granted to it by and under an act of Congress entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean and to secure to the Government the use of the same for postal, military, and other purposes," approved July 1st, 1862, and acts amendatory thereof and supplemental thereto, which

acts purport to grant to the Western Pacific Railroad Company every alternate section of public land designated by odd numbers within the limit of twenty miles on each side of its road not sold, reserved, or otherwise disposed of by the United States at the time the line of said road is definitely fixed; and defendant avers that the line of said road was definitely fixed for the purposes of said grant on or before the 15th day of April, 1868; that said railroad was completed on or before June 1st, 1869, and that on the 30th day of January, 1865, the Secretary of the Interior made and
7 ordered the withdrawal of lands, as provided for and directed in said acts of Congress, for the benefit of said railroad company; and defendant avers that the plaintiff claims title to said lands in the complaint described under and through said grant and said patents so issued to said railroad company and not otherwise.

Defendant further says that prior to said 15th day of April, 1868, the Supreme Court of the United States, on appeal from the district court of the United States for the northern district of California, — a certain cause wherein José Noriega and Robert Livermore, or their representatives, were plaintiffs and The United States was defendant, confirmed to said Noriega and Livermore, or to their heirs and assigns, a certain Mexican grant known as the "Los Pocitas," situate in what is now known as the "Livermore valley," in Alameda county, California, which grant purported to have been made to said Noriega and Livermore, or their grantor, in the year 1839; that the boundaries of said land, as found and confirmed by said district and Supreme Courts, was and is as follows, to wit: Bounded on the north by the Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the establishment of San José, and on the west by the rancho of Don José Dolores Pacheco, and that the lands described in the complaint are included within said boundaries and were a part of said grant; that final confirmation of said grant was made and entered in said district court of the United States for the northern district of Cali-
8 fornia, under and in accordance with the mandate of said Supreme Court in said cause, on the 24th day of February, 1865.

That after said last-named day and some time during the year 1865 an official survey of the lands so confirmed to said Noriega and Livermore, or to their heirs and assigns, was made by or under the direction of the surveyor general of the United States for the State of California, which survey was duly approved by said surveyor general, and that said survey included the lands in controversy in this cause.

That said survey was afterwards, in the year 1868, set aside by the Commissioner of the General Land Office or Secretary of the Interior and a new survey ordered which should contain but two square leagues.

That in March, 1869, said new survey was made, which survey contained but two square leagues, and excluded the lands in controversy; said last-named survey was duly approved by the sur-

veyor general of the United States and was afterwards, on the 6th day of June, 1871, finally approved and confirmed by the Secretary of the Interior; that on or about the 28th day of June, A. D. 1871, the township plats of the lands embraced within the exterior boundaries of said Mexican grant "Los Pocitas," as found and confirmed as aforesaid and excluded by said final survey and segregation of said two leagues, was filed in the United States district land office at San Francisco. Defendant further avers that the land described in the complaint first became public lands of the United States on the 6th day of June, 1871; that said lands did not pass to said railroad company under said acts nor under any act or acts of Congress; that said patent was made to said railroad company without authority of law; that the same is wholly void and of no effect, and that said plaintiff has no right or title to said lands under said patent or otherwise.

And the defendant further alleges that the lands in the complaint described are and ever since the 6th day of June, 1871, have been public lands of the United States, subject to the operation of the general laws thereof touching the possession and disposition of the same, and is and was at and long prior to the time of the alleged entry and ouster complained of subject to pre-emption settlement under the pre-emption laws of the United States.

That thereafter, to wit, on or about the — day of October, 1877, he, the defendant, entered into and settled upon the lands described in the complaint of the plaintiff; that he erected a dwelling-house and made other improvements thereon, and has ever since resided upon and been in possession of the same and the whole thereof, and cultivated the same, claiming and holding it under the pre-emption laws of the United States, and he still and now holds and claims the same under said pre-emption laws; that the defendant is and was at the time he so entered upon said lands as aforesaid a citizen of the United States, over the age of twenty-one years, and the head of a family, and has never had the benefit of a pre-emption; that he did not leave lands of his own to settle upon the lands described in the complaint, and was not then and is not now the owner of 320 acres of land in any State or Territory of the United States; that he did not settle upon said lands for the purpose of acquiring title thereto for any person other than himself; that he has not made any contract whereby the title which he may acquire from the United States enures in whole or in part to the benefit of any person or persons other than himself; that the said settlement was not made for the purpose of speculation, but with the view of making said premises a home, and that said land is agricultural and not mineral land.

That on or about the — day of November, 1877, and while settled upon and in the exclusive possession of the land and premises described in the complaint, he, defendant, presented his declaratory statement of his intention to pre-empt said lands in due form, as prescribed by the laws of the United States in that behalf, to the register and receiver of the United States district land office at San Francisco, and offered to file the same, and at the same time tend-

ered to said officers the fee prescribed by law therefor; that said officers refused to receive and file said statement, for the reason that said lands had theretofore been patented to the Western Pa-
11 cific Railroad Company as aforesaid; and he avers that he has in all respects complied with the requirements of said pre-emption laws so far as he has been permitted to do so by the said officers of the said land office, and that he has been and is ready and willing to pay the United States for said lands.

III.

And for a third defense and further answer herein he says—

That the plaintiff claims title to the lands described in the complaint under the acts of Congress and the patent as hereinbefore in the second defense stated, and to which statements the defendant refers as a part of this third defence; and further alleges that one of the conditions upon which said lands were granted to said railroad company, if they were at all included in said grant, was that the same should be sold by said company within three years from and after the completion of its road; that said road was completed on or before June 1st, 1869, and defendant avers upon information and belief that said company has not sold said land in the complaint described within three years after the completion of its road, or at any time; but that as between said railroad company and the plaintiff said company still and now is and at the commencement of this suit was the equitable owner thereof.

12 Wherefore defendant prays to be hence dismissed with his costs. Dated December 5, 1878.

MICH. MULLANY,
Attorney for Defendant.

(Duly verified.)

(Endorsed:) Service of a copy of the within amended answer admitted this 30th day of December, 1878. Wm. Irvine, attorney for plaintiff. Filed Dec. 30th, 1878. Chas. G. Reed, clerk, by Geo. W. Reed, deputy clerk.

(Title of Court and Cause.)

Demurrer.

The plaintiff in the above-entitled action demurs to the amended answer of the said defendant therein, and specifies the following grounds of demurrer to the second and third answers and defenses set forth in said amended answer:

I.

To the second answer and defense, that the same does not state facts sufficiently to constitute a defense.

II.

13 To the third answer and defense, that the same does not state facts sufficient to constitute a defense.

WM. IRVINE,
Plaintiff's Attorney.

(Endorsed:) Service hereof admitted January 9, 1879. Mich. Mullany, defendant's attorney. Filed January 10, 1879. Chas. G. Reed, clerk, by Geo. W. Reed, deputy clerk.

(Title of Court and Cause.)

December Term, 1878.

FRIDAY, *February* 14, 1879.

Present: Hon. S. B. McKee, judge.

This cause having been heretofore submitted to the court upon plaintiff's demurrer to the amended answer in said cause, and the court having now duly considered the same, it is ordered that said demurrer be, and the same hereby is, sustained as to the third defense in said action contained, and that said demurrer be, and the same hereby is, overruled as to the second defense in said answer contained.

(Title of Court and Cause.)

Decision.

This cause came on for trial on the 11th day of April, A.
14 D. 1883, by the court without a jury, a jury having been waived by the parties plaintiff and defendant. Messrs. Shafter, Parker & Waterman appeared as counsel for plaintiff and Mich. Mullany for the defendant, and from the admissions of the parties and the evidence adduced the court finds the following facts, viz:

First. On the 10th day of April, A. D. 1839, the Mexican government granted to Jose Noriega and Robert Livermore a certain tract of land known by the name of "Los Pocitas," which tract so granted was designated and described as follows, viz: Bounded on the north by the Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the establishment of San José, and on the west by the rancho of Don Jose Dolores Pacheco, containing in all two square leagues, a little more or less, provided that quantity be contained within the said boundaries; and if less than that quantity be found to be contained therein, then that less quantity and all of said described tract of land.

Second. The departmental assembly of the Mexican government confirmed said grant on the 22d day of May, A. D. 1840.

Third. On the 27th day of February, A. D. 1852, said José Noriego and Robert Livermore petitioned the board of land commissioners, appointed under the provisions of the act of Congress approved March 3rd, 1851 (B. M. M., D. C. S. C.), entitled "An act to ascer-

tain and settle the private land claims in the State of California," to have said grant confirmed, and on the (B. M. M., D. C. S.
15 C.) 4th day of February, A. D. 1854, the said board of land commissioners duly confirmed the same to said Noriega and Livermore, their heirs and assigns, and the decree of confirmation so made by said board of land commissioners designated and described the said grant as follows, viz: "Bounded on the north by the Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the establishment of San José, and on the west by the rancho of Don Jose Dolores Pacheco, containing in all two square leagues, a little more or less, provided that quantity be contained within the boundaries named; and if less than that quantity be contained therein, then that less quantity is hereby confirmed."

Fourth. The United States district court for the northern district of California, on appeal to it from said decree of said board of land commissioners and upon the records and evidence which were adduced before it, duly confirmed said grant to said Jose Noriega and Robert Livermore, their heirs and assigns, on the 18th day of February, A. D. 1859, to the same extent and for the same quantity of land and by the same description and under the same conditions as the said board of land commissioners had done, and in all things affirmed the decree of said board of land commissioners.

Fifth. The Supreme Court of the United States, on appeal to it from said decree of said district court, affirmed the said decree of said district court and every part thereof on January 14th,
16 1861, viz., at the December term, A. D. 1860, and the mandate from said Supreme Court was presented to and filed in said district court in said cause on the 24th day of February, A. D. 1865, and upon the filing of said mandate an order was made and entered by said district court that said claimants (viz., Noriega and Livermore, their heirs and assigns) be allowed to proceed under the decree of said district court as under final decree.

Sixth. The land described in the complaint and in controversy herein forms part of the tract, and lies within the boundaries designated and set forth in the said decrees of the board of land commissioners and the United States district court for the northern district of California and affirmed by the United States Supreme Court.

Seventh. On September 21st (B. M. M., D. C. S. C.), A. D. 1865, the United States surveyor general for California authorized and ordered one E. H. Dyer, a deputy United States surveyor, to make a survey of said Rancho Los Pocitas within the boundaries so designated and set forth in said decrees of the board of land commissioners and of said United States district court, and said deputy United States surveyor did accordingly make a survey, field-notes, and plat of said Mexican grant Los Pocitas in October, A. D. 1865, and the same were duly returned, and on the 8th day of February, A. D. 1867, said survey, field-notes, and plat were approved by the United States surveyor general, and on the — day of July, A. D. 1868,

17 the same were approved by the Commissioners of the General Land Office of the United States.

Eighth. The land described in the complaint and in the controversy herein is included within and forms part of the tract of land so surveyed and platted by said E. H. Dyer, deputy United States surveyor.

Ninth. On the 30th day of July, A. D. 1868, the Secretary of the Interior disapproved of said survey and plat so made by said E. H. Dyer, because the same contained more than two square leagues, and directed that a new survey be made of said Mexican grant which should contain but two square leagues of land.

Tenth. In March, 1869, the United States surveyor general for California proceeded under said instructions of the Secretary of the Interior (received through the Commissioner of the General Land Office) and caused said Mexican grant to be again surveyed by said E. H. Dyer, deputy United States surveyor, within the boundaries designated and set forth in said decrees of confirmation, and a plat and field-notes of said survey were returned and the same were approved by the United States surveyor general on the 11th day of May, A. D. 1871, and were approved by the Commissioner of the General Land Office on the 1st day of March, A. D. 1871, and were approved by the Secretary of the Interior on the 6th day of June, A. D. 1870, on which last-named day said survey and plat became final, and on the 20th day of August, A. D. 1872, a United States patent was issued to the grantees of said Mexican grant,
18 their heirs and assigns, for the land so surveyed and platted in March, A. D. 1869, and the land in controversy and described in the complaint herein is not included in the tract so surveyed and platted in March, 1869, and patented to said Mexican grantees on August 20th, 1872.

Eleventh. The land described in the complaint and in controversy herein was held and claimed as a part of said Mexican grant Los Pocitas continually from the 10th day of April, 1839, until the 6th day of June, 1871, and on said last-named day it first became public land of the United States, and it has ever since been and is now public land, subject only to the settlement of defendant thereon as a pre-emption settler and claimant.

Twelfth. The United States survey and township plat embracing the land in controversy and described in the complaint herein were filed in the proper United States land office at San Francisco, California, on the 27th day of June, A. D. 1871, and have ever since been and are now on file therein. Said quarter section of land is agricultural land and contains one hundred and sixty (160) acres only, and it has never been enclosed or fenced.

Thirteenth. On the — day of October, A. D. 1877, the defendant, John Quigley, entered into the possession of and settled upon the quarter section of land described in the complaint and in controversy herein with the intention of pre-empting the same
19 under the laws of the United States, and he immediately erected a dwelling-house and made other improvements thereon, and he has ever since resided upon and has been in the

exclusive and actual possession of said quarter section of land and has cultivated the same, and has held and does now hold said quarter section of land under the pre-emption laws of the United States; that at the time said defendant entered into possession of said land on the — day of October, A. D. 1877, and for long prior thereto he was and has ever since been and is now a citizen of the United States, over twenty-five years of age, and a married man and the head of a family, and he has never pre-empted any other land within the United States or any of the territories thereof, and he did not leave lands of his own to settle upon the land described in the complaint and in controversy herein, and he was not then and has not since been and is not now the owner of three hundred and twenty (320) acres of land within the United States or the territories thereof, and he did not settle upon said land described in the complaint for the purpose of acquiring title thereto for the benefit of any other person than himself, and no contract, express or implied, does now or ever did exist whereby the title which he may acquire from the United States for said land shall enure in whole or in part to the benefit of any person or persons other than himself, and ever since his said settlement on said land defendant has resided and does now reside thereon with his wife and family, and cultivates the same and makes it his home.

20 Fourteenth. On the — day of November, 1877, and while settled upon and in the exclusive possession of said quarter section of land described in the complaint, defendant presented his declaratory statement of his intention to pre-empt said quarter section of land in due form, as prescribed by the laws of the United States in that behalf, to the register and receiver of the said United States land office at San Francisco, California, and offered to file the same, and at the same time tendered the legal fees to said officers and to each of them for filing the same, and said declaration and fees were refused by said officers, and he has been and is ready and willing to pay the United States for said land as a pre-emption settler.

Fifteenth. The only claim of title or right to the possession plaintiff had when this action was commenced, or has now, to the land described in the complaint is that said land was granted to the Western Pacific Railroad Company under the act of Congress of the United States entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," approved July 1st, 1862, and the act of July 2d, 1864, amendatory thereof, and that on the 7th day of May, 1874, a patent was issued by the officers of the United States land department to the Central Pacific Railroad Company as successor of said Western Pacific Railroad Company, and that

21 a deed of conveyance was made and executed to him by said Central Pacific Railroad Company on June 10, 1874, and that said patent and deed embraced a description of the land in controversy with other lands. The patent is in the following words and figures, viz:

"United States of America to all to whom these presents shall come, Greeting:

Whereas by the act of Congress approved July 1st, 1862, as amended by the act of July 2d, 1864, to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military, and other purposes, and the act of March 3d, 1865, authority is given to the Western Pacific Railroad Company of California, a corporation existing under the laws of the State, to construct a railroad and telegraph line under certain conditions and stipulations, as expressed in said acts, and provision is made for granting to the said company every alternate section of public land designated by odd numbers to the amount of ten alternate sections per mile on each side of the said railroad, on the line thereof and within the limits of twenty miles on each side of said road not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of the said road is definitely fixed; and whereas an official statement bearing date February 1st, 1870, from the Secretary of the Interior, has been filed in the General Land Office, show-
22 ing that the commissioners appointed by the President under provisions of the sixth section of the said act of Congress, approved July 2d, 1864, have reported to him that the line of railroad and telegraph of said company has been constructed and fully completed and equipped in the manner prescribed by the acts of Congress relative to the Pacific railroad and telegraph line; and whereas by articles of agreement entered into under the laws of the State of California, between the said Western Pacific Railroad Company and the Central Pacific Railroad Company, said companies were amalgamated and consolidated under the name of the Central Pacific Railroad Company, upon the 22d day of June, 1870, as shown by a certified copy of the articles of consolidation filed with the Secretary of the Interior on the 28th day of September, 1870, by C. P. Huntington, vice-president of said Central Pacific Railroad Company; and whereas certain tracts of land have been selected by Charles J. Torbert, the deputy agent of the said Central Pacific Railroad Company, successors of the said Western Pacific Railroad Company, as shown by his original lists of selections, dated July 25th, 1873, and January 7th, 1874, and certified under date of August 9th, 1873, and January 7th, 1874, by the registers and receiuers at Stockton and San Francisco, California, and the vice-president of the said Central Pacific Railroad Company, successor of the Western Pacific Railroad Company, has applied for a conveyance of the title of said lands, granted by the aforesaid acts of Congress to
23 the said Western Pacific Railroad Company, its associates, successors, and assigns, the said tracts being described as follows, viz:

(Here follows a description of the land described in the complaint, with other lands.)

Now know ye that the United States of America, in consideration of the premises and pursuant to the said acts of Congress, have given and granted and by these presents do give and grant unto the Central Pacific Railroad Company, successor as aforesaid, and to its successors all the tracts of land described in the foregoing, yet excluding and excepting all mineral lands, should any such be found in the tracts aforesaid; but the exclusion and exception, according to the terms of the statute, shall not be construed to include coal and iron lands; to have and to hold, &c.

In testimony whereof I, Ulysses S. Grant, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed, &c.

[SEAL.] ULYSSES S. GRANT,
By S. D. WILLIAMSON, *Secretary.*"

Sixteenth. The line of the road of the Western Pacific Railroad Company from San Francisco to Sacramento, California, including that portion of said line which runs through said county of Alameda, was definitely fixed, and a map of the same was duly filed with the Secretary of the Interior on the — day of January, 1865, and prior to the 30th day of January, 1865, under and for
24 the purposes of said act of Congress, approved July 1st, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean and to secure to the Government the use of the same for postal, military, and other purposes," and the act amendatory thereof, and said railroad was completed and in full operation prior to the 1st day of June, A. D. 1869.

Seventeenth. On the 30th day of January, A. D. 1865, the Secretary of the Interior caused the lands within the limits designated by said acts of Congress of July 1st, 1862, and the act amendatory thereof, subject to the operation and provisions of said acts of Congress, to be withdrawn from location, pre-emption, homestead, private entry, and sale, under and in accordance with the provisions of said acts of Congress for the benefit of said Western Pacific Railroad Company. The land in controversy herein is within the limits over which said withdrawal of the Secretary of the Interior extended, and is located about eight miles from the line of said railroad.

Eighteenth. The plaintiff was not on the 22d day of December, 1877, and has not since been and is not the owner or seized in fee simple or possessed or entitled to the possession of the land described in the complaint and in controversy herein, and the defendant did not on said 22d day of December, 1877, or at any time oust or eject the plaintiff from said land or from any part thereof, and defendant did not enter into or upon said land without right
25 or title, and defendant has not since said day unlawfully or wrongfully withheld and he does not now unlawfully or wrongfully withhold possession of said land or of any part thereof, and plaintiff has not suffered damage in the sum of one thousand ($1,000) dollars or in any sum of money whatever by reason of de-

fendant's entry upon or withholding possession of said tract of land, and the value of the rents and profits of said land since said 22d day of December, 1877, has been fifty ($50) dollars per annum.

As conclusions of law from the foregoing facts the court finds and holds:

1st. That at the time the line of the road of said Western Pacific Railroad Company was definitely fixed, viz., on or before the 30th day of January, 1865, and during all the time from April 10th, A. D. 1839, until the 6th day of June, A. D. 1871, the land described in the complaint and in controversy herein was held and claimed as a part and reserved for satisfaction of said Mexican grant, Los Pocitas, and it did not pass, but was reserved from the grant of lands under said acts of Congress to said Western Pacific Railroad Company.

2d. That the form of patent issued to the Central Pacific Railroad Company, which bears date the 7th day of May, 1874, was issued without authority of law, and the same is void; and the deed of the Central Pacific Railroad Company to plaintiff, dated June 10th, 1874, conveyed no title to plaintiff for the land in controversy.

26 3d. That defendant is now and has been continually since said — day of October, A. D. 1877, lawfully and rightfully in the possession of the land described in the complaint as a pre-emption claimant and settler.

4th. That plaintiff was not on the 22d day of December, 1877, and has not since been and is not entitled to the possession or seized in fee of said land or of any part of it, and he is not entitled to any relief herein; and

5th. The defendant is entitled to judgment for his costs and disbursements against plaintiff.

Let judgment be entered accordingly.

Dated May 8th, A. D. 1883.

A. M. CRANE, *Judge.*

(Title of Court and Cause.)

Judgment.

This cause came on regularly for trial on the twelfth day of April, 1883, Messrs. Shafter, Parker & Waterman as counsel for the plaintiff, and Mich. Mullany, as counsel for the defendant. A trial by jury having been expressly waived by the counsel for the respective parties, the case was tried by the court sitting without a jury.

Thereupon witnesses on the part of the plaintiff and defendant were duly sworn and examined and documentary evidence adduced and certain admissions made and accepted by the

27 respective parties. The evidence being closed, was submitted to the court for consideration and decision, and now, to wit, on this the eighth day of May, 1883, after due deliberation thereon, the court delivered its findings and decision in writing, which is filed, and ordered that judgment be entered in accordance therewith. Wherefore, by reason of the law and by the findings afore-

said, it is by the court here ordered, adjudged, and decreed that plaintiff, William B. Carr, was not on the 22d day of December, 1877, and has not since been and is not entitled to the possession or seized in fee of the tract of land described in the complaint herein or of any part of said land, and that he, said plaintiff, is not entitled to any relief herein; and it is further ordered, adjudged, and decreed that defendant, John Quigley, do have and recover from said plaintiff, William B. Carr, his costs and disbursements expended and incurred in this action, taxed at the sum of —— ($——) dollars.

Judgment recorded on the 14th day of May, 1883, in Judgment Book 3, page 460.

(Endorsed:) Filed May 14th, 1883. Truman H. Allen, clerk, by Louis B. Redman, deputy clerk.

28 (Title of Court and Cause.)

Notice of Intention to Move for New Trial.

Please take notice that plaintiff intends to move the court to set aside and vacate the decision and judgment heretofore rendered herein, and to grant a new trial in this case, upon the following grounds, viz:

1st. Insufficiency of the evidence to justify the decision rendered herein.

2d. Insufficiency of the evidence to justify the judgment rendered herein.

3d. That the decision and judgment respectively are and is against law.

4th. Error in law occurring at the trial of this action and excepted to by the plaintiff.

The said motion will be made upon a statement of the case to be hereafter prepared by the plaintiff.

SHAFTER, PARKER & WATERMAN,
Attorneys for Plaintiff.

To Michael Mullany, attorney for defendant.

(Endorsed:) Due service of the within notice is hereby admitted this 24th day of May, 1883. Mich. Mullany, attorney for defendant. Filed May 24th, 1883. Truman H. Allen, clerk, by W. B. Thomas, deputy clerk.

29 (Title of Court and Cause.)

Statement on Motion for New Trial.

This cause came on for trial on the 11th day of April, A. D. 1883, by the court without a jury, a jury having been waived by the parties, plaintiff and defendant. Messrs. Shafter, Parker & Waterman appeared as counsel for plaintiff, and Mich. Mullany for the defendant.

The plaintiff, to maintain the issues on his part, offered in evidence a patent of the United States, of which the following is a copy, to wit:

"UNITED STATES OF AMERICA:

To all to whom these presents shall come, Greeting:

Whereas by the act of Congress approved July 1st, 1862, as amended by the act of July 2d, 1864, to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military, and other purposes, and in the act of March 3d, 1865, authority is given to the Western Pacific Railroad Company of California, a corporation existing under the laws of the State, to construct a railroad and telegraph line under certain conditions and stipulations as expressed in said acts, and provision is made for granting to the said company every alternate section of public land, designated by odd numbers, to the amount of ten alternate sections per mile on each side of said railroad, on the line thereof and within the limits of twenty miles on each side of said road, not sold,
30 reserved, or otherwise disposed of by the United States and to which a pre-emption or homestead claim may not have attached at the time the line of the said road is definitely fixed; and whereas an official statement, bearing date February 1st, 1870, from the Secretary of the Interior, has been filed in the General Land Office, showing that the commissioners appointed by the President under provisions of the sixth section of the said act of Congress approved July 2d, 1864, have reported to him that the line of railroad and telegraph of said company had been constructed and fully completed and equipped in the manner prescribed by the acts of Congress relative to the Pacific railroad and telegraph line; and whereas, by articles of agreement entered into under the laws of the State of California between the said Western Pacific Railroad Co. and the Central Pacific Railroad Co. of California, said companies were amalgamated and consolidated under the name of the Central Pacific Railroad Company, upon the 22d day of June, 1870, as shown by a certified copy of the articles of consolidation, filed with the Secretary of the Interior on the 28th day of September, 1870, by C. P. Huntington, vice-president of said Central Pacific Railroad Company; and whereas certain tracts of land have been selected by Charles J. Torbert, the deputy agent of the said Central Pacific Railroad Company, successors of the said Western Pacific Railroad Company, as shown by his original lists of selections, dated July 25th, 1873, and January 7th, 1874, and certified under date
31 of August 9th, 1873, and January 7th, 1874, by the registers and receivers at Stockton and San Francisco, California, and the vice-president of the said Central Pacific Railroad Company, successor of the Western Pacific Railroad Company, has applied for a conveyance of the title of said lands granted by the aforesaid acts of Congress to the said Western Pacific Railroad Company, its asso-

ciates, successors, and assigns, the said tracts being described as follows, viz:

(Here follows a description of the land described in the complaint herein.)

Now, know ye that the United States of America, in consideration of the premises and pursuant to the said acts of Congress, have given and granted and by these presents do give and grant unto the said Central Pacific Railroad Co., successor as aforesaid, and to its successors all the tracts of land described in the foregoing, yet excluding and excepting all mineral lands, should any such be found in the tracts aforesaid, but the exclusion and exception, according to the terms of the statute, shall not be construed to include coal and iron lands; to have and to hold, &c.

In testimony whereof I, Ulysses S. Grant, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed, &c., this seventeenth day of May, A. D. 1874.

[SEAL.] ULYSSES S. GRANT,
By S. D. WILLIAMSON, *Secretary.*

32 That the said patent was recorded in the office of the recorder of Alameda county in Book "A" of Patents, pages 620 to 623.

Defendant objected to said patent as evidence on the ground that it has not been shown that the lands described therein and in controversy in this action were not sold, reserved, or disposed of by the United States at the time the line of said railroad was definitely fixed; which objection was overruled and exception duly taken by defendant, and said patent was put in evidence.

Plaintiff then put in evidence a deed of conveyance from said Central Pacific Railroad Company to himself, dated, acknowledged, and recorded in office of the recorder of said county of Alameda on the 10th day of June, 1871, which deed conveyed to plaintiff such title to the land in controversy as became vested in said Central Pacific Railroad Company by virtue of or under said letters patent.

The defendant admitted that he was in possession of said land described in the complaint herein at the time this action was brought.

The parties, plaintiff and defendant, then agreed that the value of the rents and profits of the land in controversy from December 22d, 1877, has been fifty ($50) dollars per annum.

Plaintiff rested.

The defendant thereupon proved by testimony and established the following facts, to wit:

First. That on the 10th day of April, A. D. 1839, the Mexi-
33 can government granted to Jose Noriega and Robert Livermore a certain tract of land known by the name of "Los Pocitas," which tract so granted was designated and described as follows, viz: Bounded on the north by the Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing

line of the establishment of San José, and on the west by the rancho of Don Jose Dolores Pacheco, containing in all two square leagues, a little more or less, provided that quantity be contained within the said boundaries, and if less than that quantity be found to be contained therein, then that less quantity and all of said described tract of land.

Second. That the departmental assembly of the Mexican government confirmed said grant on the 22d day of May, A. D. 1840.

Third. That on the 27th day of February, A. D. 1852, said José Noriega and Robert Livermore petitioned the board of land commissioners appointed under the provisions of the act of Congress approved March 3rd, 1851, entitled "An act to ascertain and settle the private land claims in the State of California," to have said grant confirmed, and on the 14th day of February, A. D. 1854, the said board of land commissioners duly confirmed the same to said Noriega and Livermore, their heirs and assigns, and the decree of confirmation so made by said board of land commissioners designated and described the said grant as follows, viz: "Bounded on the north by the Lomas de las Cuevas, on the east by the Sierra de
34 Buenos Ayres, on the south by the dividing line of the establishment of San José, and on the west by the rancho of Don Jose Dolores Pacheco, containing in all two square leagues, a little more or less, provided that quantity be contained within the boundaries named, and if less than that quantity be contained therein, then that less quantity is hereby confirmed."

Fourth. That the United States district court for the northern district of California, on appeal to it from said decree of said board of land commissioners and upon the records and evidence which were adduced before it, duly confirmed said grant to said Jose Noriega and Robert Livermore, their heirs and assigns, on the 18th day of February, A. D. 1859, to the same extent and for the same quantity of land and by the same description and under the same conditions as the said board of land commissioners had done, and in all things affirmed the decree of said board of land commissioners.

Fifth. That the Supreme Court of the United States, on appeal to it from said decree of said district court, affirmed the said decree of said district court and every part thereof on January 14th, 1861, viz., at the December term, A. D. 1860, and the mandate from said Supreme Court was presented to and filed in said district court in said cause on the 24th day of February, A. D. 1865, and upon the filing of said mandate an order was made and entered by said district court that said claimants (viz., Noriega and Livermore, their heirs and
35 assigns) be allowed to proceed under the decree of said district court as under final decree.

Sixth. That the land described in the complaint and in controversy herein forms part of the tract and lies within the boundaries designated and set forth in the said decrees of the board of land commissioners and the United States district court for the northern district of California and affirmed by the United States Supreme Court; that on September 21st, A. D. 1865, the United States surveyor general for California authorized and ordered one E. H. Dyer, a

deputy United States surveyor, to make a survey of said Rancho Los Pocitas within the boundaries so designated and set forth in said decrees of the board of land commissioners and of said United States district court, and said deputy United States surveyor did accordingly make a survey, field-notes, and plat of said Mexican grant Los Pocitas in October, A. D. 1865, and the same were duly returned, and on the 8th day of February, A. D. 1867, said survey, field-notes, and plat were approved by the United States surveyor general, and on the — day of July, A. D. 1868, the same were approved by the Commissioner of the General Land Office of the United States.

Seventh. That the land described in the complaint and in controversy herein is included within and forms part of the tract of land so surveyed and platted by said E. H. Dyer, deputy United States surveyor.

Eighth. That on the 30th day of July, A. D. 1868, the Sec-
36 retary of the Interior disapproved of said survey and plat so made by said E. H. Dyer because the same contained more than two square leagues, and directed that a new survey be made of said Mexican grant, which should contain but two square leagues of land.

That in March, 1869, the United States surveyor general for California proceeded under said instructions of the Secretary of the Interior (received through the Commissioner of the General Land Office) and caused said Mexican grant to be again surveyed by said E. H. Dyer, deputy United States surveyor, within the boundaries designated and set forth in said decrees of confirmation, and a plat and field-notes of said survey were returned, and the same were approved by the United States surveyor general on the 11th day of May, A. D. 1870, and were approved by the Commissioner of the General Land Office on the 1st day of March, A. D. 1871, and were approved by the Secretary of the Interior on the 6th day of June, A. D. 1871, on which last-named day said survey and plat became final, and on the 20th day of August, A. D. 1872, a United States patent was issued to the grantees of said Mexican grant, their heirs and assigns, for the land so surveyed and platted in March, A. D. 1869, and the land in controversy and described in the complaint herein is not included in the tract so surveyed and platted in March, 1869, and patented to said Mexican grantees on August 20th, 1872.

Ninth. That the United States survey and township plat,
37 embracing the land in controversy and described in the complaint herein, were filed in the proper United States land office at San Francisco, California, on the 27th day of June, A. D. 1871, and have ever since been and are now on file therein; that said quarter section of land is agricultural land and contains one hundred and sixty (160) acres only, and it has never been enclosed or fenced.

Tenth. That on the — day of October, A. D. 1877, the defendant, John Quigley, entered into the possession of and settled upon the quarter section of land described in the complaint and in controversy herein with the intention of pre-empting the same under the

laws of the United States, and he immediately erected a dwelling-house and made other improvements thereon, and he has ever since resided upon and has been in the exclusive and actual possession of said quarter section of land and has cultivated the same and has claimed to hold and does now claim to hold said quarter section of land under the pre-emption laws of the United States; that at the time said defendant entered into the possession of said land, on the — day of October, A. D. 1877, and for long prior thereto, he was and has ever since been and is now a citizen of the United States, over twenty-five years of age, and a married man and the head of a family, and he has never pre-empted any other land within the United States or any of the territories thereof, and he did not leave lands of his own to settle upon the land described in the complaint and in controversy herein, and he was not then and has not
38 since been and is not now the owner of three hundred and twenty (320) acres of land within the United States or the territories thereof, and he did not settle upon the said land described in the complaint for the purpose of acquiring title thereto for the benefit of any other person than himself, and no contract, express or implied, does now or ever did exist whereby the title which he may acquire from the United States for said land shall enure in whole or in part to the benefit of any person or persons other than himself, and ever since his said settlement on said land defendant has resided and does now reside thereon, with his wife and family, and cultivates the same and makes it his home.

Eleventh. That on the — day of November, 1877, and while settled upon and in the exclusive possession of said quarter section of land described in the complaint defendant offered to file a declaratory statement of his intention to pre-empt said quarter section of land to the register and receiver of the said United States land office at San Francisco, California, and offered to file the same and at the same time tendered the legal fees to said officers and to each of them for filing the same, and said declaration and fees were refused by said officers, and he has been and is ready and willing to pay the United States for said land as a pre-emption settler.

To the introduction of which testimony and to each and every particular part thereof respectively the plaintiff interposed
39 the objection that the same was irrelevant and immaterial and incompetent generally on the grounds:

1st. That the grant mentioned aforesaid was conclusive of the right of the parties.

2d. That the right to issue the same could not be inquired into or questioned or impeached collaterally or in this action; which said objections were severally overruled by the court; to which ruling the plaintiff duly excepted.

Defendant also proved—

Twelfth. That on June 30th, 1870, the Commissioner of the General Land Office of the United States directed and instructed the register and receiver of the United States land office at San Francisco district (in which the land in controversy is located), by an official communication, that the claims of the said Rancho Los

Pocitas were then unadjusted, and that they, said register and receiver, must decline to receive any application whatever from pre-emption claimants or any other claimants for tracts of land lying within the exterior boundaries of said rancho, as designated by the said board of land commissioners and said United States district court, until they should receive formal notice from the United States General Land Office of the release of the lands from suspension.

And that said communication of June 30th, 1870, was received at San Francisco by said register and receiver on July 11th, 1870.

40 The defendant also proved and established by testimony of witnesses and by documentary evidence the following facts, to wit:

Thirteenth. That the line of the road of the Western Pacific Railroad Company from San Francisco to Sacramento, California, including that portion of said line which runs through said county of Alameda, was definitely fixed, and a map of the same was duly filed with the Secretary of the Interior on the — day of January, 1865, and prior to the 30th day of January, 1865, under and for the purposes of said act of Congress, approved July 1st, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military, and other purposes," and the act amendatory thereof, and that said railroad was completed and in full operation prior to the 1st day of June, A. D. 1869.

Fourteenth. That on the 30th day of January, A. D. 1865, the Secretary of the Interior caused the lands within the limits designated by said acts of Congress of July 1st, 1862, and the acts amendatory thereof, subject to the operation and provisions of said acts of Congress, to be withdrawn from location, pre-emption, homestead, private entry, and sale, under and in accordance with the provisions of said acts of Congress for the benefit of said Western Pacific Railroad Company, and that the land in controversy herein is within the limits over which said withdrawal of the Secretary of the

41 Interior extended, and is located about eight miles from the line of said railroad.

The following is a copy of the order and authorization of the United States surveyor general for California to said E. H. Dyer, United States deputy surveyor, under and in accordance with which, and the printed instructions accompanying the same, the plat and survey of said Rancho "Los Pocitas" was made by said E. H. Dyer in A. D. 1865, viz:

U. S. SURVEYOR GENERAL'S OFFICE,
SAN FRANCISCO, *Sept. 21st*, 1865.

SIR: Whereas it appears by a certified copy of a mandate placed on file in this office that the Supreme Court of the United States affirmed the decision of the U. S. district court for the northern district of California, confirming the claim of Jose Noriega and

Jose Livermore, executor, and Josefa Higuera de Livermore, executrix, of the last will and testament of Robert Livermore, deceased, to a tract of land named "Los-Pocitas;" and whereas application has been made by the parties interested for a survey and location of said claim, the estimated amount for the expenses whereof having been duly deposited, I have thought proper to appoint you my deputy in this special case for the execution of said survey.

In the language of the decree of the U. S. district court herein referred to, the tract confirmed to the claimants is as follows:

42 "The land of which confirmation is hereby made is known as Las Pocitas, and is bounded and described as follows, to wit: on the north by the Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the establishment of San José, and on the west by the rancho of Don José Dolores Pacheco, containing in all two square leagues, provided that quantity be contained within the boundaries named; and if less than that quantity be contained therein, then that less quantity is hereby confirmed." Reference for further description to be had to the map marked "C" filed in this cause.

Section 7 of the act of Congress of July 1st, 1864, directs this office in such cases "to follow the decree of confirmation as closely as practicable whenever such decree designates the specific boundaries of the claim; but when such decree designates only the outboundaries within which the quantity confirmed is to be taken, the location of such quantity shall be made as near as practicable in one tract and in a compact form.

You will, therefore, make your survey in accordance with the requirements of the law and the said decree of confirmation.

In all other respects you will comply with the printed instructions of this office, dated June 1st, 1864, relative to the location of private grants, a copy of which is herewith enclosed for your information and guidance.

43 A copy of the above-mentioned map marked "C" is also herewith enclosed for your governance.

Very respectfully, your ob't serv't,

——— ———,

U. S. Surveyor General.

Eben H. Dyer, Esq., U. S. deputy surveyor.

(Endorsed:) U. S. surveyor general's office, Sept. 21st, 1865. Instructions to Eben H. Dyer, D. S., for survey of Rancho Las Pocitas. R. Livermore.

And the following is a copy of the map "C" referred to in said order and authorization. (See stipulation hereafter.) The land in controversy in this action is located within the boundaries delineated on said map "C," the diseño accompanying said Mexican grant, Las Pocitas, and the following is a copy of the decree or judgment of the district court of the United States for the northern district of California and also the mandate of the Supreme Court of the United States, already referred to; viz:

At a stated term of the district court of the United States of America for the northern district of California, held at the court-room, in the city and county of San Francisco, on Friday, the twenty-fourth day of February, in the year of our Lord one thousand eight hundred and sixty-five.

Present: The Honorable Ogden Hoffman, district judge.

44 THE UNITED STATES } No. 135.
vs.
JOSÉ NORIEGA *et al.* }

This cause came on to be heard on appeal from the final decision of the board of commissioners to ascertain and settle the private land claims in the State of California, under the act of Congress approved March 3d, 1851, upon the transcript of the proceedings and decision of the said board of commissioners and the papers and evidence on which the said decision was founded and upon the further evidence filed in this court, and it appearing to the court that the said transcript has been duly filed according to law, and the cause having regularly come to a hearing, it is by the court hereby ordered, adjudged, and decreed that the said decision be, and the same is hereby, in all things affirmed; that the claim of the appellees is a good and valid claim, and that the same is hereby confirmed.

The land of which confirmation is hereby made is known as "Las Pocitas," and is bounded and described as follows, to wit: On the north by the Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the establishment of San José, and on the west by the rancho of Don Jose Dolores Pacheco, containing in all two square leagues, provided that quantity be contained within the boundaries named; and if less than that quantity be contained therein, then that less quantity is
45 hereby confirmed. Reference for further description to be had to the map marked "C," filed in this cause.

Dated San Francisco, February 18th, A. D. 1859.

OGDEN HOFFMAN,
U. S. District Judge.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judge of the district court of the United States for the northern district of California, Greeting:

Whereas lately, in the district court of the United States for the northern district of California, before you, in a cause between The United States, appellants, and Jose Noriega and Jose Livermore, executor, and Josefa Higuera de Livermore, executrix, of the last will and testament of Robert Livermore, deceased, appellees, the decree of the said district court was in the following words, viz:

This cause came on to be heard on appeal from the final decision of the board of commissioners to ascertain and settle the private land claims in the State of California under the act of Congress approved March 3d, 1851, upon the transcript of the proceedings and decision

of the said board of commissioners and the papers and evidence on which the said decision was founded and upon the further evidence filed in this court, and it appearing to the court that the said transcript has been duly filed according to law, and the cause
46 having regularly came to a hearing, it is by the court hereby ordered, adjudged, and decreed that the said decision be, and the same is hereby and in all things, affirmed; that the claim of the appellees is a good and valid claim, and that the same is hereby confirmed.

The land of which confirmation is hereby made is known as "Las Pocitas" and is bounded and described as follows, to wit: on the north by the Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the establishment of San José, and on the west by the rancho of Don Jose Dolores Pacheco, containing in all two square leagues, provided that quantity be contained within the boundaries named; and if less than that quantity be contained therein, then that less quantity is hereby confirmed. Reference for further description to be had to the map marked "C" filed in this case, as by the inspection of the transcript of the record of the said district court which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress in such case made and provided fully and at large appears.

And whereas in the present term of December, in the year of our Lord one thousand eight hundred and sixty, the said cause came on to be heard before the said Supreme Court on the said transcript of the record and on the motion of Mr. Attorney General Stanton, it is now here ordered, adjudged, and decreed by this court that
47 the decree of the said district court in this cause be, and the same is hereby, affirmed. January 24th.

You, therefore, are hereby commanded that such further proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Roger B. Taney, Chief Justice of our said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and sixty.

[SEAL.] WM. THOS. CARROLL,
Clerk of the Supreme Court of the United States.

(Endorsed:) No. 135. No. 64. December term, 1860. Mandate, Supreme Court United States. United States *vs.* Noriega *et al.* Filed February 24th, 1865. W. H. Chevers, clerk.

At a stated term of the district court of the United States of America for the northern district of California, held at the court-room, in the city and county of San Francisco, on Friday, the twenty-fourth day of February, in the year of our Lord one thousand eight hundred and sixty-five.

Present: The Honorable Ogden Hoffman, district judge.

THE UNITED STATES *vs.* JOSE NORIEGA *et al.* } No. 135.

48 And now come the said claimants, by their attorneys, and present the mandate of the Supreme Court of the United States in the above-entitled cause.

Whereupon it is ordered that said mandate be filed in the cause, and that said claimants be allowed to proceed under the decree of this court, affirmed by the Supreme Court of the United States, as under final decree.

OGDEN HOFFMAN,
District Judge.

(Endorsed:) The within and foregoing are true copies of the originals on file and of record in the United States district court, State of California, and may be used as evidence in place of originals or certified copies in W. B. Carr *vs.* John Quigley and W. B. Carr *vs.* William J. Fallon in superior court of Alameda county with like force and effect as could be the originals or certified copies thereof. Dated November 28, 1881. (Signed) Wm. Irvine, attorney for plaintiffs.

And the map "C" referred to in said decree is the same already set forth in the said order for a survey given to said E. H. Dyer, United States deputy surveyor, by the United States surveyor general for California.

To the introduction of the foregoing testimony and documentary evidence the plaintiff duly objected on the grounds and for the reasons stated last aforesaid concerning other evidence; which
49 objections were severally overruled, and plaintiff duly excepted.

Defendant rested.

The plaintiff then called THEO. G. LINTON, who, being sworn, testified as follows:

"I am a copying clerk in the surveyor general's office, in San Francisco. I have with me a record from the office of the surveyor general that is called the 'Lewis survey.' Its contents are on file in that office; it bears the number 49."

Plaintiff offered said survey, consisting of plot and field-notes, with the endorsements thereon, in evidence.

The defendant objected to the same being put in evidence on the grounds that—

First. The same is immaterial, irrelevant, and incompetent, and that it was not authorized or approved by any competent or lawful authority; and

Second. No survey could have been made for the Rancho Las Pocitos in A. D. 1854, the year in which this so-called survey purports to have been made, said rancho or Mexican grant being then and for many years thereafter in course of judicial settlement, and

the same is on its face but a mere initiatory survey of said rancho; and

Third. The diagram or map attached to the field-notes thereof, or map and field-notes combined, do not embrace or purport to embrace all the land within the boundaries of said Mexican
50 grant Las Pocitos, and said "Lewis survey," so called, is contrary to the decree of the board of land commissioners and orders for instructions under which the same was made.

The court overruled the objections of defendant and said survey was put in evidence, and the same, consisting of plot, field-notes, and endorsements thereon, surveying reports and returns, are hereunto annexed and marked Exhibit "A."

Plaintiff called WM. J. LEWIS, who, being sworn, testified as follows:

I reside in San Francisco and have so resided since A. D. 1849. My business is a surveyor and engineer, and was engaged in said business for more than 20 years prior to coming to California and ever since. I have been a deputy surveyor of the United States for California and am yet; have been such deputy since the middle of 1854.

Question. Will you look at that report and field-notes and say whether that is your work, please?

Mr. MULLANY: We object on the ground that it is immaterial and irrelevant; it speaks for itself.

The COURT: Objection overruled, and defendant excepted.

Answer. These are the field-notes and tabling of the initiatory survey of the Rancho Las Pocitos, claimed by Robert Livermore.

WILLIAM J. LEWIS, *Surveyor.*

That endorsement and everything that follows is in my own handwriting. It is the original.

51 Q. The papers that are referred to there as being put in?

A. All the general observations are in my own handwriting, signed by William J. Lewis, surveyor. First is the field-notes, then the general observations, and then the calculation of the contents of Rancho Las Pocitos, made by me, William J. Lewis, United States deputy surveyor; the list of the names of the individuals employed and the capacity in which they acted; the survey of the assistant that I had. I was authorized to administer the oaths all in my own handwriting—my own notes. I, William J. Lewis, deputy surveyor, do solemnly swear—well, that is my final oath—that in pursuance of instructions received from John C. Hayes, surveyor general of the United States, and in strict conformity with the laws of the United States, &c. That is signed by me and subscribed and sworn to the 31st day of May, 1854, before William A. Cornwall, notary public.

The WITNESS (continuing): This blue paper put in, it seems to be United States assistant.

By Mr. IRWIN:

Q. Who helped to make the survey?

A. We made the survey. I was authorized to administer oaths. I administer it at the end. That is the end of that.

Copy of notification to Augustus Alviso, purchaser and part owner of the rancho of Jose Dolores Pacheco; the approval of the foregoing field-notes by Surveyor General Hayes.

52 By Mr. MULLANY:

Q. It is called an "initiatory" survey, isn't it?

A. No, sir; it is called a preliminary survey; I believe that is all.

Mr. IRVINE:

Q. Would you recognize the plot that you made to the survey if you were to see the copy of it?

A. Yes, sir.

The WITNESS: That is my survey; that is a correct copy made from my survey of the Las Pocitas.

By Mr. IRVINE:

Q. This is what purports to be a true and correct copy of the original survey of the Rancho de las Pocitas, made by Wm. J Lewis:

"The field-notes of which are recorded in this office. Witness my hand and seal of office this the 4th day of December, 1878. Theodore Wagner, surveyor general."

A. It is a certified copy.

Q. You recognize that, you say, as a true copy of the plat of the survey that you made?

A. The original is there, and it is a traced copy of my survey.

Mr. IRVINE:

Q. I want to call attention to some portions of it marked "General observations," which reads as follows: "This ranch is situated at the western basis of the Coast Range, in a valley which is nearly enclosed by the mountains and the spurs projecting from it (reading general observations).

53 That is to explain the survey as made. I will read from the commencement of the report also. (Reads.)

Q. Will you state, with reference to the survey being made upon the ground in the presence of Mr. Livermore, what claim he made, if any, with respect to the ranch and the boundaries, and what you did—that is, whether what you did was in accordance or not with what he claimed to be the grant?

Mr. MULLANY: Objected to on the ground that Mr. Livermore alone, or even with his other cograntees, did not have the lawful power, and could not designate the limits of their grant; that that power lay with the courts and with the Government of the country,

and that we have already shown to this court that the courts and the Government have assumed that duty and have performed it; that the duty was not performed by the courts until the 24th of February, 1865, some eleven years after the time that is here spoken of in connection with the survey, and that the first grantees had no right to mention what the boundaries were; that it is incompetent, irrelevant, and immaterial in this action.

The COURT: Objection overruled.

Mr. MULLANY: The defendant excepts.

By Mr. IRVINE:

Q. State as nearly as you can remember what you did up there, and whether Mr. Livermore was present, and if the notes will aid your memory any you can refer to them.

The COURT: You have already read in the presence of the witness what Mr. Livermore did and said.

54 Q. Do you remember anything more than that, Mr. Lewis, which you have written down here; are you able to state what you have written there now, that that is true?

A. Oh, this is true; this is all in my own handwriting, and that is true, just the way I have stated about it; I say that was written at the time; I believe I stated in the general observations that the intention was to run it along the foot of the hills.

By Mr. MULLANY:

(Int.) Q. That tells for itself, doesn't it?

A. It does.

Mr. IRVINE: Just one question.

Q. That does not tell whether the line you run corresponded substantially with the base of the foot-hills.

Mr. MULLANY: We object to it because the instrument will speak for itself.

Mr. IRVINE: It don't show whether it was run at the base or not.

A. I will answer. It was run at the base of the hills and that to the creek.

The COURT: Objection overruled.

Mr. MULLANY: The defendant excepts.

A. It was run at the base of the Cuevas hills, the base of the hills on the left; it was run at the base of the hills as stated here; sometimes I had to run across little corners and take in little valleys in order to have it take in the straight lines, but it was run substantially to the base of the hills, and that has been decided to be
55 the United States law time and time again since I made that survey; it was legal, the lines we run along the base of the mountains, when they were called for by the boundaries.

Cross-examination of W. J. LEWIS.

By Mr. MULLANY:

Q. Did you not know of the grant known as the Peralta grant, that took in the tops of the mountains at Oakland?

A. I have never seen it, I believe.

Q. Then you are not very well versed in all the grants—the limits of them?

A. Certainly; several hundred grants. I cannot (B. M. M., D. C. S. C.)——

Q. Then why should you say the courts have decided it?

A. (Int'g.) The courts have decided recently.

Q. The courts have decided a long time ago that the grants ran to the tops of the mountains?

A. No; they decided—well, I might say—I wanted to say that was about that matter——

Q. (Int.) That is all.

The WITNESS: I know in one case, for instance——

Mr. MULLANY: That is all.

The WITNESS: On the Canada de Rincon San Lorenzo. In that case the mountains sloped positively down to the creek and there was no valley.

Mr. IRVINE: I propose now, if your honor please, to read
56 the decision of the Commissioner of the General Land Office in the case of the railroad against Arthur Sinclair and others, in which this identical land was in controversy.

Mr. MULLANY: Do you mean to say that Mr. Quigley had anything to do with it?

Mr. IRVINE: I mean to say that Mr. Quigley did not know anything about it and it was before he jumped it. It was the effect of the Lewis survey. I suppose the shortest way is to refer to so much of it as relates to that particular subject by way of information.

Mr. MULLANY: The defendant objects to that paper and its contents being read in evidence on the grounds that:

1. It is incompetent, irrelevant, and immaterial in this action.

2. This defendant was not a party to or aware of the cause or proceedings which gave rise to that paper or so-called decision, and he is not bound or affected by the same in any way.

3. The proceedings mentioned in that paper or decision, so called took place long after the line of the Western Pacific railroad had been definitely fixed and even said railroad was completed.

4. Neither the Secretary of the Interior nor the Commissioner of the General Land Office nor any other officer of the Land Department of the United States had jurisdiction or power to make or establish the exterior boundaries of or for the Mexican grant Las Pocitas after the same had been forever settled and patented or make or establish such boundaries contrary to the boundaries
57 made and established by the board of land commissioners and the proper district court and the Supreme Court of the United States.

5. This decision, so called, shows on its face to be unauthorized

and void in this, that it is a plain attempt to overrule or override the decision of the Supreme Court of the United States.

The COURT: I will hear that part of it read which they propose to give in evidence and then I will decide this objection.

Mr. Irvine reads as follows:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *May 3rd*, 1873.

Register and receiver, San Francisco, Cal.

GENTLEMEN: The case of Arthur St. Clair *vs.* The Western Pacific Railroad Company, involving the right to lots 1 and 2 of N. W. quarter of section 19, township 3 south, range 3 east, Mount Diablo base and meridian, has been carefully examined and considered. St. Clair filed D. S. 6330 for said tracts March 11th, 1870, alleging settlement November 20th, 1863. He filed his amended D. S., 7619, July 3d, 1871, alleging settlement November 20, 1863. The proof shows that he made his settlement on the 20th of November, 1868. The land in controversy is part of an odd-numbered section within the withdrawal for the said railroad company, made January 30th, 1865, and as claimed by said company in part satisfaction of
58 its grant under act of Congress approved July 1, 1862, and subsequent acts amendatory thereof.

The railroad was definitely located through a Mexican grant known as Las Pocitas between the 28th of March and the 16th of April, 1868. The pre-emptor claims that tract *is* covered by his filing and on which he has made his settlement was reserved by being within the exterior limits or boundaries of the said Mexican grant at and before the date of the said railroad withdrawal and location and hence did not pass to the railroad, but became subject to pre-emption on the approval of the final survey of the Las Pocitas claim in 1871. The act of July 1st, 1862 (B. M. M., D. C. S. C.), making the grant of lands to which this railroad is now entitled expressly excepted all lands reserved by the United States, and it is well settled by repeated departmental decisions that lands embraced within the limits of an unadjusted claim under a Mexican grant are reserved within the meaning of the said act and the acts amendatory thereof. Even in cases where it was found and held that the claim was illegal and fraudulent, but presented and asserted in due time and form, it has been held that the reservation of the lands covered thereby was complete until the final judgment rejecting the same, and that the right of the railroad could not attach to such lands because of the reservation; that when released from the reservation by the final rejection of the claim they became a part of the public domain, subject to pre-emption and homestead entry. It there-
59 fore follows that in order to determine the rights of the parties to this controversy it is first necessary to ascertain what the status of these lands was at the time of the definite location of the railroad in 1868. If at that time they were within the exterior limits of the Las Pocitas claim they were reserved and excluded from the grant to the

railroad. If, however, they were outside of the exterior limits of the Las Pocitas claim the right of the road under the grant and withdrawal previously made became perfect at that time and no settlement or entry made after that withdrawal could effect or defeat the rights of the railroad. The grant of the Las Pocitas rancho was made by the Mexican authorities to Jose Noriega and Robert Livermore on the 10th day of April, 1839. This grant recites that "whereas Don Jose Noriega and Robert Livermore have petitioned for their own benefit and that of their families the place known by the name of Las Pocitas, which is in the Willow Grove de la Agua," so far as the mountain range of Buenos Ayres and the hills of Las Cuevas, I have thought proper to grant them said place. The land of which donation is made is of two leagues, a little more or less, as the deseño annexed to the proceedings with its respective limits explains. The judge who shall give possession will give the same to be measured agreeably to ordinance in marking the boundaries, leaving the excess which might result to the nation for such uses as may be deemed convenient. Judicial possession does not ap-
60 pear to have been given, but the grant was approved by the departmental assembly on the 22nd of May, 1840, by reference to the place called Las Pocitas del Velle. On the 27th of February, 1852, Jose Noriega and Robert Livermore petitioned the board of commissioners for ascertaining and settling private land claims in the State of California to confirm their claim, describing it as "a certain tract of land called Las Pocitas, containing two leagues, more or less." On the 14th of February, 1854, the board confirmed the claim, describing the boundaries as follows: On the north by the Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the establishment of San José, and on the west by the rancho of Don José Dolores Pacheco, containing in all two square leagues, a little more or less, reference for further description to be had to the map marked "C" and filed in this cause.

The decree of the board was affirmed by the district court of the United States on the 18th day of February, 1859, and by the Supreme Court at the December term, 1860. The judicial confirmation — follows that of the board as to boundaries is limited to two square leagues and is confined to the land known as Las Pocitas.

It is apparent from this statement of facts taken from the official records, first, that the petition of Noriega and Livermore to the Mexican government was for a certain place known as Las Pocitas; second, that the grant made by the Mexican government was
61 of said place and confined to two leagues, a little more or less; third, that the petition of said Noriega and Livermore to said board of land commissioners for the confirmation of claim described it as a certain tract of land called Las Pocitas, containing two leagues, more or less; fourth, that the board confirmed the same as a claim, containing in all two square leagues, a little more or less; fifth, that the courts affirmed the decree of the board, referring to the claim as the land known as Las Pocitas, containing in all two square leagues.

Just how much land was embraced in the rude sketch or deseño which accompanied the grant for the purpose of indicating the locality of Las Pocitas it is impossible to say, and from the language of the grant, as well as the hills, mountains, and other objects represented on the deseño, I conclude that while it was understood and known that the place Las Pocitas contained only about two square leagues that the deseño represented a larger quantity, and that the surplus being reserved for the use of the nation was to be excluded by judicial survey, and that until the lines of Las Pocitas were definitely fixed in this or some other manner which would indicate to the Government the exact position and boundaries of the claim a larger area than two square leagues might be held and reserved under the claim. What this larger area was is to be gathered, not only from the deseño, but from the whole record and from the acts and declarations of the grantees.

62 A judicial measurement of the two leagues granted not having been made by the Mexican government prior to the acquisition of California by the United States, Las Pocitas was not, at the time of the confirmation by the board of commissioners, separated from the adjoining private claims and public lands by well-defined boundaries, and therefore confirmation was made of two leagues in all and reference made to the general outlines made in the grant and imperfectly delineated on the deseño. Subsequent to the decree of confirmation by the board, however, Livermore procured a survey of said rancho by Wm. J. Lewis, a deputy surveyor acting under the direction of the surveyor general of the State of California.

This survey was commenced in the field May 5th, 1854, and completed on the 15th of the same month—about three months after the confirmation of the claim by the board of commissioners and undoubtedly before the grantees were aware that the government intended to appeal from the decree of the commissioners and while they thought the decree of that board was final; and therefore, so far as their connection with it is concerned, it indicates as clearly what they understood to be the boundary of their claim as asserted by them prior to and at that time as though the survey had not been premature, and no change was made as to the matter of boundaries by either the district or supreme court, both following the board of commissioners in that respect. The deputy surveyor and his assistants, as well as the surveyor general, supposed that

63 they were making a regular and authorized and official survey in accordance with law, as appears from the records, they then having taken the oaths and made the certificates usual in the discharge of official duty.

This survey contained more than double the quantity of land actually granted and confirmed.

Therefore, while it could not be regarded as a survey of the actual quantity and boundaries of the claim as confirmed and did not bind or preclude the Government from making a final and correct survey of the quantity actually confirmed in accordance with the decree of confirmation, it may be properly regarded and treated as

settling the question as to the locality and exterior boundaries of the Las Pocitas, as asserted in the claim presented by Noriega and Livermore to the board of commissioners.

It appears from the field-notes and return of this survey made by Deputy Surveyor Lewis that Livermore and his neighbors, who own lands adjoining Las Pocitas, were present; that they proceeded from Livermore's house to an oak tree which was pointed out by Livermore as a corner, and that he also pointed out a line which he claimed as the western boundary of his ranch; that this corner and line were agreed upon as correct; that the survey was commenced at the oak pointed out as aforesaid, which was marked "R. L. 1;" that at the base of foot-hills, Buenos Ayres ridge, a stake was compassed, marked "R. L. 2" (subsequently changed to "R. L. 5"); that on the 8th of May Augustin Alviso, then the
64 owner of the rancho granted to Jose Dolores Pacheco, having been previously notified, was present, and pointed out a line running from oak marked "R. L. 1" as the boundary between his land and that of Livermore, in which the latter concurred. This line terminated at the foot of the Cuevas hills, the same being the northwest corner of Las Pocitas. At this point a large stake was placed, marked "R. L. 2." From this stake the northern boundary of the rancho was run as near as practicable along the base of the Cuevas hills to a stake marked "R. L. 3." From stake "R. L. 3" a line was run, following in its general course the base of the Buenos Ayres ridge, to stake marked "R. L. 4;" the eastern corner of the ranch from stake marked "R. L. 4," a line was run to stake "R. L. 5" (which had at first been marked "R. L. 2").

It appears that the line from the oak pointed out by Livermore as corner and marked "R. L. 1 to the stake R. L. 5," at the base of the Buenos Ayres ridge, and divided Las Pocitas from what was known as the establishment of San José, mentioned in the decree of confirmation as one of the boundaries, was run in the presence of the neighboring proprietors, and was satisfactory to them and to Livermore; that the line run from the oak R. L. 1 to the stake R. L. 2 at the foot of Cuevas hills, being the line between Las Pocitas and the Pacheco rancho, also named in the decree of confirmation as one of the boundaries, was run in the presence of the
65 owner of the latter, and that when he pointed out the line Livermore concurred with him. From stake R. L. 2, the northern boundary of the Rancho Las Pocitas was run as near as practicable along the base of the Cuevas hills to stake R. L. 3. This appears to have been in exact conformity to the grant which refers to the hills Las Cuevas as a boundary and to the decree of confirmation, which says, in describing the boundaries, "on the north by the Lomas de las Cuevas." From stake R. L. 3 to stake R. L. 4, the line followed in its general course to the base of Buenos Ayres ridge, which is also in accordance with the grant and confirmation. Some doubt was entertained as to whether the latter line should be run at the base or summit of the Buenos Ayres ridge, but Livermore settled this, as will be seen from the following quotations from a report of the deputy surveyor:

"The calls in the grant might, perhaps, authorize the running of the eastern boundary along the summit instead of at the base of the mountain, but no such construction is asked by the claimant (Robert Livermore); on the contrary, he expressed himself entirely satisfied with the boundaries as I surveyed them and as represented in the accompanying map."

The surveyor general approves this survey as a survey of Las Pocitas, executed in conformity to the confirmation of the board of land commissioners. His approval is dated June the 19th, 1854.

66 That this survey, evidently made pursuant to act of Congress approved August 31st, 1852, by the proper officers, under instructions and the sanction of the proper oath, executed with all due formality and care under the immediate supervision of Livermore, who pointed out the corners and lines and who, after the work was fully completed, expressed himself as entirely satisfied with the boundaries as surveyed, contained all the boundaries within the exterior boundaries of the grant made by the Mexican government and described in the petition of Noriega and Livermore for confirmation, cannot be doubted. The theory upon which the survey was based, as well as the manner of its execution, shows clearly that the grantees were not limited as to quantity in accordance with the decree of confirmation which confined them to two square leagues, but by the exterior boundaries of their claim, as they and their neighbors understood them at the time of the survey and before.

The deputy surveyor, in making his return, says: "It may be proper before closing these observations to remark that in the petition to the Mexican authorities which precedes the grant and forms a part of the expediente the land is described as two leagues, a little more or less, in length along the valley and about the same in width across the valley, and bounded on the side of the Cuevas hills and the sierra of Buenos Ayres by the margin of the hills. I have no doubt that it was the intention of the Mexican government to grant the land more particularly described, and that the survey as made fulfills the intention.

67 The surveyor general in approving the survey said: "In their decree they state the quantity to be two square leagues, a little more or less, but the specific quantity actually found within the boundaries mentioned in said decree is four square leagues, 3,485 acres and $\frac{59}{100}$."

Thus it appears that the surveyor general and deputy surveyor, in making this survey, acted upon the theory that the grantees were entitled to all the land included within the exterior boundaries mentioned within the grant and decree of confirmation, regardless of quantity.

These boundaries were pointed out by Livermore and the survey made accordingly. It therefore must have included all the land claimed at and before that time by the grantees, and all that they asked the board to confirm, and, as I have heretofore shown, it embraced more than double the quantity actually granted and confirmed.

The remark of the deputy surveyor as to the statement in the original petition confirming the claim within the margin of the hills accounts for Livermore being satisfied with the line run at the base of the hills and harmonizes the claim and the survey thereof made by Lewis with the terms of the grant, which was of the place "Las Pocitas," reserving the excess to the nation. This survey was made in 1854, while Livermore was alive. He died in 1858. There is not one word in the record tending to show that he at any time expressed dissatisfaction with the survey or desired to have it modified or changed in any respect whatever, and there is no evi-
68 dence showing that his heirs objected to it prior to 1865, which was after the withdrawal for the railroad company. Then they were advised by an attorney that, under the decree of the Supreme Court, they might possibly secure more than two square leagues.

Under this advice the enlarged survey by Dyer of 43,011 and $\frac{31}{100}$ acres was executed, but it was made at the request of parties claiming to be attorneys for the heirs, and it does not appear that even at that time the heirs had any personal connection with the matter further than to protest against the movement to expand the ranch beyond its legitimate and long-recognized boundaries, on the ground that it would delay them in securing a patent for the lands to which they were entitled. It is therefore, in my opinion, clear that the exterior boundaries of the place "Las Pocitas" as claimed, as granted and as presented to the board for confirmation by Noriega and Livermore, were ascertained, marked out on the face of the earth, and fixed to the entire satisfaction of the grantees by this Lewis survey made in 1854, and that neither the grantees nor their heirs repudiated or objected to the boundaries until after the surrounding lands had been opened to survey and sale and some of them withdrawn for the railroad, the exterior boundaries of Las Pocitas having been thus ascertained and determined in 1854 and acquiesced in by the grantees and their heirs from that time until after the withdrawal for the railroad. The lands outside of the boundaries of Las Pocitas, as ascertained and fixed by the
69 Lewis survey, were from that time at least a part of the public domain, and as such subject to survey and to such disposition as the Government thought proper to make of them, and were therefore properly withdrawn as inuring to the railroad company under its grant, and no claim or settlement presented or made after the date of the withdrawal could have the effect to defeat the right of the railroad. In support of this view I may refer briefly to the state of affairs in California immediately after its acquisition and the congressional legislation of 1851 and 1853 relating to lands in that State. By the treaty of Gaudalupe Hidalgo, Mexico ceded California to the United States, but it was understood and agreed that private property should be respected, and therefore Congress wisely provided by act, approved March 3, 1851, entitled "An act to ascertain and settle private land claims in the State of California," for the presentation of private land claims to a board of land commissioners, who had power to confirm or reject them, subject to

the right of appeal to the district court of the United States and from thence to the Supreme Court.

Under this act parties were limited to two years from the date thereof to present their claims to the board, and if they did not present them within that time they were absolutely and forever barred, and it was provided that "all lands, the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held, and
70 considered as part of the public domain of the United States."

Pending the presentation of these claims Congress made no provision for the sale of the public lands in California, or for opening them for settlement; but on the 3rd of March, 1853, the very day the time for presenting private land claims to the board expired, it, by an act entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therefor, and for other purposes," provided for the survey and sale of the public lands of California, excepting only 16th and 36th sections, land appropriated by the act or reserved by competent authority, lands claimed under any foreign grant or title, and mineral lands.

Now it is evident from this legislation, first, that Congress did not open the lands in California to settlement and sale for two years from March 3, 1851, giving that time to private claimants to present their claims according to their respective rights and boundaries.

Second. That the moment that period expired it opened all the lands to survey and settlement and sale, except those lands specially reserved, among which were "lands claimed under any foreign grant or title."

The act of March 3d, 1853, refers to lands claimed, and undoubtedly means the lands embraced in a claim previously presented to the board of commissioners for confirmation, and not to lands
71 covered by claims which might be asserted thereafter, for the time had then expired for the presentation of claims.

This brings us back to the question as to what was included in the claim of Noriega and Livermore as presented to the board of commissioners. The question is not what was finally confirmed to them, but what they presented for confirmation, for the act of March 3d, 1853, recognized as reserved what was then claimed under a foreign grant of title, and the reservation thus made was continued until the final decree of the proper tribunal, affirming, rejecting, or modifying the claim. The answer to the question as to what was presented to the board for confirmation and reserved in this case of Las Pocitas until the final decree of the supreme court at the December term, 1860, and the approval of the final survey of the grant in 1871, is already given in my remarks on the Lewis survey; that survey fixed the exterior boundaries of the rancho, and the grantees, in pointing out and adopting the boundaries fixed by it, said to the Government and to all the world that the lands embraced within those lines constituted the whole of their claim, and that beyond those lines they had no interest or right whatsoever. From that day the Government had a right to treat the lands outside of the claim thus surveyed as public lands; and it did so treat them by survey-

ing and opening them to market and withdrawing them for the railroad.

72 The subsequent presentation of a claim under a survey or otherwise embracing more lands or other lands than those presented to the board for confirmation could not affect the question, for the time, as we have seen, had elapsed in which private claims could be presented directly for confirmation, and it would be absurd to say that a party could do indirectly by an expansion of his claim, under a false or fraudulent survey, that which he was precluded from doing directly by its presentation.

The adoption of such a rule would not only be contrary to law and unjust to the railroad company in this particular case, but it would retard the growth and prosperity of the State of California and ruin and impoverish thousands and tens of thousands of honest, *bona fide* settlers upon the public land by enabling rapacious and unprincipled speculators to tie up and suspend from entry for indefinite periods of time immense portions thereof under the thin guise or pretense that they were once embraced in some Mexican grant.

That they could find deputy surveyors pliant and flexible enough to disregard and pay no attention to grants and decrees of confirmation and run lines wherever speculators desired is evident from the Dyer survey and Dyer's testimony in this case, which shows that a ranch of two square leagues in all, according to the decree of confirmation, was surveyed to suit an attorney, so as to embrace over 43,000 acres or nearly ten square leagues.

73 There is a voluminous record of testimony in this case, most of it irrelevant and contradictory, but I think, taking the record as a whole, it is clearly established that the Lewis survey was a correct delineation of the exterior boundaries of Las Pocitas, and I therefore decide that all the odd-numbered sections outside of said Lewis survey inure to the railroad under its grant, and that all odd-numbered sections within the survey being reserved by the claim of Las Pocitas until after the definite location of the road in 1868 did not pass to it under its grant, and, upon the approval of the final survey of Las Pocitas, became subject to pre-emption entry. Upon this principle I award lots 1 and 2, section 19, township 3 south, range 3 east, to the railroad company and reject the claim of St. Clair thereto, subject to the right of appeal within 60 days from notice, etc.

Very respectfully, WILLIS DRUMMOND,
Commissioner United States Land Office.

SAN FRANCISCO, CALIFORNIA, *Nov.* 30, 1881.

I hereby certify that the foregoing is a true, full, and correct copy of the original letter of the Commissioner of the General Land Office of May 3d, 1873, now on file in this office.

WM. R. WHEATON, *Register.*

(Endorsed:) General Land Office, May 3d, 1873. Arthur St. Clair *vs.* The Western Pacific Railroad Company. Certified copy.

Parties notified May 19th, 1873.

(Subsequently the court admitted the foregoing letter in evidence and the defendant excepted.)

74 Mr. IRVINE: I produce from the United States surveyor general's office for California the "Book of Instructions for Surveys for Private Land Claims and Instructions for Preliminary Surveys of Ranchos," and from that record, page 205, I offer in evidence the order of the surveyor general, under date of April 5th, 1854, to Wm. J. Lewis, deputy surveyor, directing him in the following terms: "Messrs. Hastings, Thomas and Morse, who represent themselves as the attorneys for Robert Livermore, have applied to this office for a survey of Las Pocitas, a tract of land claimed by the latter. In compliance with their application you are hereby appointed to execute a preliminary survey of said tract. The claim has been confirmed by the board of land commissioners in the following words, to wit: In this case, on hearing the proofs and allegations, it is adjudged by the commission that the claim of the said petitioner is valid, and it is therefore decreed that the same be confirmed. The lands of which confirmation are hereby made of Las Pocitas are bounded and described as follows, to wit: On the north by the Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the establishment of San José, and on the west by the rancho of Don Jose Dolores Pacheco, containing in all two square leagues, a little more or less, reference for further description to be had to the map marked "C" and filed in the case. Your survey will therefore conform to the above decree. I herewith enclose a copy of the map of the original,

75 which is on file with the board of commissioners. In tracing out the boundaries you will avail yourself of the best local evidence. You will notify the adjoining claimants in writing of the time you will run any line in which they may be interested. If they should agree to any lines that fact must be entered in your notes, as also their names in full, but if any objections should be made you will note the same and return to this office any protests that may be offered for that purpose. You will also run any lines which any contending parties may desire you to run if they are willing adequately to compensate you for such work. In running the exterior line you will ascertain each course and length of each line in chains and links, designating the corners with the letters R. L. and numbering the posts set in regular succession. The variation of the needle must be accurately ascertained and a survey made with reference to the meridian. Your chain must be tested by the standard in this office. Your field book is to be kept in the same manner and furnish all the information required in performing public work. Great care should be taken in all measurements and observations so as to preclude the necessity of a revision in the field at any time hereafter. You will have to qualify as if performing public work and the evidence thereof returned with your notes. The requisite oaths of the assistants may be administered by yourself. The field-notes are to be accompanied by an accurate pro-

tracted map on a scale of 40 or 20 chains to the inch, and also
76 by a correct tabling exhibiting the areas north and south to 4 figures of decimals, and by all observations and calculations in detail having reference to the ascertainment of the line or the area of the tract. You will connect one or more points of your survey with one or more points of any line or lines of the general survey of the State in order to better indicate the precise location of the tract. As this is a preliminary survey, for your compensation you will make arrangements with the claimant. I shall only add that under no circumstances will this office be responsible for any surveys connected with the execution of these instructions. Inclosed you will find a copy of the instructions for the public surveys of Oregon, applicable also to this State.

Very respectfully, etc., JOHN C. HAYES,
U. S. Surveyor General of California.

Mr. MULLANY: Defendant objects to this piece of evidence on the ground that the same is immaterial and that it has not been shown that the order or instructions therein contained were ever obeyed or followed.

The court overruled the objection, and defendant excepted, and the same was put in evidence.

It is admitted by counsel for defendant that the Lewis survey heretofore put in evidence was not appealed from after the approval by the surveyor general of the United States for the State of California, nor were any proceedings by way of appeal therein ever had.

77 Mr. IRVINE: I produce from the register of the United States land office in San Francisco a printed case containing the statement of facts and stipulation of attorneys for the respective parties in a contest brought on before the register and receiver between Arthur St. Clair and other pre-emption claimants, not including the defendant, Quigley, of all the lands outside the Lewis preliminary survey claimed by the pre-emption claimants to be within the boundaries of the original grant of Las Pocitas as confirmed by the land commission and by the United States district court, and also of certain lands inside the Lewis survey, but excluded from the final survey of the grant, and the Western Pacific Railroad Company claiming the same lands. The statement of facts shows the hearing before the register and receiver to have commenced on the 3d day of January, 1872. It gives a list of all the pre-emption claimants, of whom the defendant in this action was not one. Northwest quarter of section 19, township 2 south, range 2 east, the same lands described in the complaint, were claimed in that proceeding by Hugh McDonald as a pre-emptioner in possession (under whom defendant Quigley does not claim any rights). In that case the following stipulation was entered into, signed, and filed as follows by B. B. Newman, as attorney for the pre-emptors, and Arthur St. Clair and J. W. Shanklin and J. M. Coates, attorneys for the Western Pacific Railroad Company. The stipulation is enti-

tled "In the United States land office, San Francisco dis-
78 trict," "Arthur St. Clair *vs.* The Western Pacific Railroad Company." "All cases involving the odd-numbered sections within the so-called exterior boundaries of the Rancho Las Pocitas."

"In the above-entitled cause it is stipulated and agreed by and between the attorneys of the parties thereto that the testimony taken in this case as to the right of the Western Pacific Railroad Company shall be, and is hereby, admitted to be the evidence in each and every case involving an odd-numbered section within the limits of what is claimed to be by pre-emption claimants the exterior boundaries of the Rancho Las Pocitas."

The statement from which I read contains a description of each piece of land and the name of the pre-emptors then claiming the same.

The claimants number altogether 120, each one of whom made claim of these lands as a pre-emptor to certain subdivisions of these lands that are described in the statement severally. The said contest was decided before the register and receiver at San Francisco on the 11th day of November, 1872. With reference to the lands inside the Lewis preliminary survey the register and receiver decided the contest in favor of the pre-emptors claiming those lands. With reference to the lands in the contest outside of the Lewis survey and inside the Dyer survey, already put in evidence by the defendants, they were divided, the receiver rendering an opinion in favor of the pre-emptors, and the register an opinion in favor of the
79 railroad company. From that decision an appeal was taken to the Commissioner of the General Land Office by the Western Pacific Railroad Company, by its attorney, J. W. Shanklin, and was filed in the office of the register and receiver December 3d, 1872, appealing on account of errors of law and misapprehension of the rulings of the department. First, in finding that all the lands within the Dyer survey were treated as reserved by the department, for the proof shows that said survey was not in existence at the date of the withdrawal for the railroad company, January 30th, 1865; second, in holding that the register and receiver were therefore bound to respect the claim of the Western Pacific Railroad Company to all the land within said survey; third, in holding that the land in question within the Dyer survey is subject to the pre-emption claims of the settlers offering proof in the case; fourth, in assuming that the law or the rulings of the department confer on the register and receiver any authority to establish a line of reservation for the grant Las Pocitas or against the Western Pacific Railroad Company; fifth, in finding in the case of Weymouth *vs.* The Western Pacific Railroad Company that the lines of the Lewis initiatory survey made in 1854 determines a line of reservation against the railroad company, while in this case he holds that the line of the Dyer survey, made in October, 1865, though not made as an official survey when made, constitutes a reservation against the railroad company, thus showing that in neither
80 of these decisions has he been governed by or attempted to

confine himself to the calls of the grant as made to Livermore, or the boundaries named in the decrees of the courts, but by lines run for other purposes, and none of which became official as lines of the grant Las Pocitas or were declared by competent authority to be either exterior or final lines of the grant. That is the appeal from the register and receiver.

The appeal further states that from the register's opinion in the same case that the appeal is taken on account of errors in the findings and conclusions of law. First, in finding that all lands within the boundaries named in the grant and outlined on the deseño, and also named in the decree of the supreme court, were reserved by the Mexican government to enable the grantees to select therefrom their two leagues; second, in holding that the withdrawal by the department, for the benefit of the Western Pacific Railroad Company, did not affect the lands within those boundaries; third, in assuming authority to determine any lines in connection with the grant Las Pocitas differing from the finally confirmed lines of the grant as patented, whereby the rights of the Western Pacific Railroad Company can be affected; fourth, in finding that in the making of the Lewis survey the calls of the grant were obviously followed, whereas, on the contrary, we held that the proof shows, and the fact is admitted by the receiver, that the south line of the Pocitas grant was not a definite line fixed by the calls of the grant or the decrees of the court, but was an imaginary line which
81 could only be determined by final survey. We claim that Mr. Lewis, in making his survey, evidently mistook the meaning of the description dividing line of the establishment of San José and supposed it to mean the easterly line of the grant El Valle de San José, and thereby made an error in his survey of nearly two leagues, taking in over four leagues for the grant when it only calls for two. With this exception we have no fault to find with the preliminary lines of the Lewis survey as determining what may be called the exterior lines named in the grant papers and the decree or with their adoption by the register as the basis of his opinion, provided the law gives him the authority to fix these lines. We waive the usual privilege of time for filing arguments in the local office on appeal, as this will be done by counsel in Washington. On December 7th, 1872, Arthur St. Clair and all others named in the decision of the register filed herein on the 11th day of November, 1872, against the Western Pacific Railroad Company by B. B. Newman, attorney for pre-emption claimants, filed a notice of appeal from the decision with the register and the receiver of the land office, San Francisco, for all of the claimants, and his notice specifies as follows, among other things:

"You will please take notice that all those pre-emption settlers outside of the lines designated by the register as the lines of the Lewis survey, making and having submitted their proof and
82 referred to and mentioned in said decision of the said register, hereby appeal to the Honorable Willis Drummond, the Commissioner of the General Land Office, at Washington, D. C., from

said decision so far as the same effects said parties and each thereof upon the following grounds: First, that the evidence does not sustain said decision so far as it, the decision, applied to the appellants; second, that the admissions made and conceded in said decision do not sustain but contradict and refute the decision."

First. Upon the first ground of appeal appellants say that the evidence offered by them and filed by them in this cause clearly and beyond doubt locates upon the ground the exterior boundaries of Las Pocitas, to wit, its boundary on the north being the Lomas de Las Cuevas, its easterly boundary being the Sierra de Buenos Ayres, its southern boundary being the dividing line of the establishment of San José, and the westerly boundary being the lands of Don Jose Dolores Pacheco.

Second. In support of the location of these boundaries being the exterior lines of Las Pocitas grant, appellants offered the following evidence, and then the notice goes on to recite the evidence that is claimed to support the point.

After recital of the different items of evidence that are claimed to support the point made in the notice of appeal, the notice concludes:

"That the private chaining or lines of the private survey
83 called the Lewis survey and upon which the register bases his decision never were the lines or boundaries of the Las Pocitas, were wholly disregarded by the said commissioners and courts in their decision, and can in no respect be considered as evidence in this case for any purpose whatever, much less to outweigh and overbalance evidence of the boundaries of said grant, as designated in the decree. We insist that these decisions are *res adjudicata* and final and as full and conclusive upon the location of the exterior lines of the private grant prior to the ascertainment by actual measurement of the surplus within these boundaries after satisfying the specific quantity of two square leagues. The decision of the register is not in any manner sustained by the evidence, but on the contrary is wholly unsustained by any evidence whatsoever. In our argument upon this appeal we shall show the unfairness of said decision of the register and its utter want of support from the evidence."

(Signed) B. B. NEWMAN,
Attorney for the Appellants.

And dated December 7th, 1872.

I will next offer in evidence a true copy of the notice of appeal by Arthur St. Clair and others, pre-emption claimants, *vs.* The Western Pacific Railroad Company, contestants, from the decision of the Commissioner of the General Land Office to the Secretary of the Interior. I produce the original notice of appeal printed,
with admission of service on the 7th day of July, 1873, by
84 J. W. Shanklin, attorney for the respondent, and it is endorsed, filed July 7th, 1873, and I furnish a true copy as an exhibit in this case, marked "Plaintiff's Exhibit Appeal to Secre-

tary." This is signed by B. B. Newman, attorney for Arthur St. Clair and other appellants, and bears date San Francisco, July 2d, 1873; but defendant, John Quigley, was not a party thereto or therein and does not claim any right or interest under any person who was a party thereto. Said exhibit is made part of this statement and a copy annexed hereto.

Mr. MULLANY: Defendant objects to that notice of appeal and to the contents thereof as evidence herein on the grounds—

First, that it is immaterial, irrelevant, and incompetent, and that defendant is not a party thereto and has had no knowledge of the pendency or proceedings of the matters therein mentioned.

The court overruled the objection. Defendant excepted, and said notice of appeal was put in evidence.

Plaintiff also offered in evidence notice of appeal on behalf of the Western Pacific Railroad Company in the same case from the decision of the Commissioner of the General Land Office to the Secretary of the Interior, dated July 18th, 1873, and from so much of the decision of May 3d, 1873, as awards the odd-numbered sections lying between the grant lines of the Pocitas rancho, as finally con-
85 firmed and patented, and the lines of the survey called the Lewis survey and filed on July 18th, 1873.

Mr. MULLANY: Defendant objects to this notice of appeal and its contents as evidence on the same grounds stated in his objection to the notice of appeal and contents thereof put in evidence.

The court overruled the objection and defendant excepted, and said notice of appeal was read in evidence and a copy of which is marked "Plaintiff's Exhibit Western Pacific Railroad Company Appeal to Secretary." Said exhibit is made a part of this statement and a copy thereof is hereto annexed.

Plaintiff next offered in evidence a certified copy of the decision of the Secretary of the Interior in the same case of Arthur St. Clair and others, dated the 25th day of November, 1873. I will make it "Plaintiff's Decision of Secretary."

Mr. MULLANY: The defendant objects to this decision and its contents as evidence on the same grounds stated in his objection to the last notice of appeal and contents thereof put in evidence.

The court overruled the objection and the defendant excepted, and said decision was read in evidence. Said exhibit is made part of the statement and a copy of which is hereto annexed.

CHARLES H. CHAMBERLIN, a witness called on behalf of plaintiff, having been duly sworn, testifies as follows:

Mr. MULLANY: It is admitted that he is receiver of the United States land office at San Francisco, and has been for 16 years.

86 Mr. IRVINE:

Q. Have you made examination of the records in your office with

reference to public surveys and the times when they were made and what they were with reference to township 2 south, 1 east?

A. Townships 25, 1 E.; 25, 2 E.; 25, 3 E.; 25, 4 E.; 35, 2 E.; 25, 1 E. I took all those.

Q. Those are connecting townships?

A. Round in that vicinity a township is six miles square.

Q. One connects with another, I suppose?

A. Yes.

Q. All around in the same direction?

A. Or in that vicinity.

Q. Now, what early public surveys were made there?

Mr. MULLANY: I object to the question as being immaterial and incompetent in this, that it is no consequence what were or were not made. The only question in controversy is as to whether or not the land in dispute was within the exterior boundaries of the Las Pocitas rancho, whether surveyed or not surveyed, until the withdrawal of land for railroad purposes under the acts of Congress under which the railroad claims in this case.

Objection overruled and exception taken.

A. Township 1 south, 2 east; the north township line was run in 1851, the rest of the township lines in 1853, section lines in 1862. Township 1 south, 3 east; township lines in 1851; part of the section lines in 1851, balance in 1862. Township 2 south,
87 2 east; part of township lines in 1853, part in 1861, part in 1862, and part in 1869. 2 south, 2 east; township lines in 1853, section lines in 1857. 3 south, 2 east; part of township lines in 1853, rest of township lines and section lines in 1869. 3 south, 3 east; north township line in 1853 (B. M. M., D. C. S. C.); rest of township lines in 1862, part of section lines in 1862. 2 south, 1 east, west township line; that is the township that is directly west of this, of the land in dispute; west township line run in 1852, south township line in 1853, the rest of township lines in 1865.

(No cross-examination.)

Mr. IRVINE: Now I will offer in evidence, subject to the objections to be made to it, from the records and files of the United States land office at San Francisco, in Letter Book 791, the opinion of the Secretary of the Interior in a contested case on appeal before him of The State of California *vs.* The Central Pacific Railroad Company, successor, etc., involving the right to certain lands in township 2 south, range 1 east; township 3 south, range 1 east, and township 3 south, range 3 east, for the purpose of showing the action of the General Land Office Department of the Government in reference to the lands outside of the Lewis survey claimed by pre-emptioners to be within the out-boundaries of the original grant Las Pocitas. The defendant, John Quigley, was not a party to the proceedings
88 and does not claim any right or interest under any one who was a party to the proceedings. This opinion is as follows:

"DEPARTMENT OF THE INTERIOR,
"WASHINGTON, D. C., *June* 26, 1879."

This is addressed to the Commissioner of the General Land Office.

"SIR: I have considered the case of The State of California *vs.* The Central Pacific Railroad Company, successor by consolidation of the Western Pacific Railroad Company, involving the right to certain lands in township 2 south, range 1 east, and township 3 south (B. M. M., D. C. S. C.), range 3 east, San Francisco land district, California, on appeal from your decision of March 9th, 1878. The lands in dispute are within the 10-mile limits of the grant to the Central Pacific Railroad Company, and the odd-numbered sections were withdrawn for the benefit of said company on January 31st, 1865, and were selected by it May 12th, 1874. The State claims said lands by virtue of certain indemnity school selections made and certified subsequent to the withdrawal of the lands for railroad purposes. Part of said odd sections of land are within the Lewis survey of the Rancho Las Pocitas, which marked the extefrior boundaries of said grant prior to the approval of the final survey thereof, June 6th, 1871, and part of them are outside the same. You decided as follows:

First. That the odd sections of land within the Lewis sur-
89 vey of the Rancho Las Pocitas, being reserved for the satisfaction of said grant at the date of withdrawal for railroad purposes, were excepted from the railroad grant.

Second. That the railroad company had a superior right to the odd sections of land outside of the Lewis survey of said rancho and within its granted limits. The appeal of the State is based upon the ground that the Lewis survey of the Rancho Las Pocitas did not correctly represent the exterior boundaries of said grant, which boundaries, it is contended, rightfully included the lands now claimed by the railroad company and operated to except them from the railroad grant under the decision of the supreme court in the case of Newhall *vs.* Sanger, 2nd of Otto, 761. In the case of Arthur St. Clair *vs.* The Western Pacific Railroad, decided by your predecessor, Mr. Commissioner Drummond, on May 3, 1873, this question was elaborately discussed, and after full examination it was held that the Lewis survey was a correct delineation of the exterior boundaries of the Las Pocitas grant, and this decision was affirmed by my predecessor, Hon. C. Delano, on November 25, 1873.

The question was again raised in the argument of counsel in the case of The State of California *vs.* Townsend and others, and by my decision of January 15th, 1878, the former ruling of the department was sustained. (Copp's Land Owner for March, 1878, p. 189.) After careful examination of the argument of counsel for the State upon this question in connection with the former decision of your
90 office and this department, no new fact having been disclosed by the affidavits filed, I adhere to the conclusion that the Lewis survey was a correct delineation of the exterior boundaries of said rancho, and decline to modify former rulings on this point. In the case of The State of California *vs.* Townsend and others it was

held that the railroad company had a superior right to the odd sections of land outside of the Lewis survey of the Las Pocitas rancho, but the question of issuing patents to the company for lands which had been certified to the State under the school grant was not presented or considered, and you were directed to demand a relinquishment from the State of those tracts which had been erroneously certified or to which the company had superior right. The State has failed or refused to relinquish said land, and the question arises whether under the circumstances the lands can be patented to the company. Upon this question I am of the opinion that while the company had the superior right to said lands that the certification of the same to the State being the final act of the executive department invested therewith the legal right and title in them as fully as if they had passed by patent, and that this department has no jurisdiction or control over them. As the matter stands the company has a superior equity and the State has the legal title, and the question is one which addresses itself to the courts which alone have jurisdiction over the matter. I am of the opinion that you have no authority to issue patents for tracts which have been
91 certified to the State, and your decision upon this question is modified accordingly. Upon the other questions here presented your decision is affirmed and the papers transmitted with your letter of December 30, 1878, are hereby returned.

(Signed) C. SCHURZ, *Secretary.*"

Mr. MULLANY: Defendant objects to this decision and its contents as evidence on the same grounds stated in his objection to the last paper or decision and contents thereof put in evidence.

The court overruled the objection and the defendant excepted, and said paper was read in evidence.

Mr IRVINE: I will offer in evidence the decision and opinion of Schurz, Secretary of the Interior, dated January 15th, 1878, addressed to the Commissioner of the General Land Office, in the matter of the appeal in the case entitled State of California *vs.* M. D. Townsend, Western Pacific Railroad Company, *et al.* The parties to the contest were, first, the State of California claiming the lands by virtue of certain invalid indemnity school selections, which it is alleged were confirmed by the act of Congress of July 23d, 1866, to quiet land titles in California; and, second, certain persons claiming to be *bona fide* settlers under the pre-emption laws; and, third, the Western Pacific Railroad Company claiming the odd sections by virtue of the grant to aid in the construction of its said road. The selections by the State were made on May 10th, 1864, and the
92 selections are specified in the opinion. The Western Pacific Railroad Company claimed the odd-numbered sections of the township in satisfaction of its grant of July 1st, 1862, and the subsequent amendatory acts. The lands were withdrawn for railroad purposes on January 30th, 1865, and the road definitely located opposite thereto between the 28th day of March and April 15th, 1868; Townsend filed March 3d, 1870, for a portion of the lands;

Timothy Crowley filed July 10th, 1871; H. C. Purcell filed June 14th, 1869; John Reagan filed March 11th, 1870; G. W. French filed February 7th, 1870; Edwin Taylor filed July 17th, 1871; Simon Foscalina filed June 14th, 1869; Annie Little filed July 10th, 1871; R. D. Rankin filed September 25th, 1871; Philip Henal filed June 14th, 1869; P. H. Armstrong filed March 11th, 1870; J. W. Hampton filed March 11th, 1870; D. W. Smith filed June 16th, 1869; Joseph Barron filed June 14th, 1869, and Francisco Foscalina filed March 11th, 1870. I will offer the whole paper as an exhibit. I will call it "Plaintiff's Exhibit State of California *vs.* Townsend *et al.*," a copy of which is hereto annexed and made a part of this statement. Defendant, John Quigley, was not a party thereto and does not claim any right or interest under any one that was a party thereto.

Mr. MULLANY: Defendant objects to this paper and its contents as evidence on the same grounds stated in his objection to the last paper and contents thereof put in evidence.

93 The court overruled the objection and the defendant excepted, and said paper was read in evidence.

Mr. IRVINE: I will say in that connection that I put the decision and opinion in evidence for the purpose of showing the action and decision of the Land Department with reference to the land outside of the Lewis survey and claimed to be within the original boundaries of the Las Pocitas grant.

Mr. MULLANY: Then to it I make the further objection that it does not purport from the evidence already put in by the plaintiff himself to show any disposition made of a portion of the lands outside of the Lewis survey so far and within the exterior limits of the Mexican grant, to wit, that portion which was actually patented to the grantees of the Mexican grant, and therefore it does not subserve the purpose for which it is offered.

Mr. IRVINE: I will put in evidence a certified copy of the decision of the Secretary of the Interior, O. H. Browning, dated July 30th, 1868, disapproving and rejecting the Dyer survey and directing the surveyor general of California to reduce the survey to two square leagues, marked "Plaintiff's Exhibit Browning, Secretary, Dyer Survey," a copy of which is hereto annexed and made part of this statement.

Mr. MULLANY: No objection. (It is stipulated at this stage (the court not being in session), under the understanding heretofore had between counsel, that as to any decision by the court upon

94 the admission or rejection of the evidence which has been offered and objected to, but not passed upon, that the court shall give the benefit of an exception to the party against whom his decision shall be made, and that such exceptions may be embodied in the statement or bill of exceptions, or in any other proceedings in which the parties may desire to have same inserted or used.)

Plaintiff rests.

Evidence for Defendant in Surrebuttal.

Mr. MULLANY: I now offer in evidence a communication from the General Land Office to the register and receiver of the local United States land office at San Francisco, California, dated June 30th, 1870, for the purpose of showing that all the land within the exterior boundaries of said rancho, Las Pocitas, including the land in controversy herein, was held, claimed, and reserved at that time as and for said Mexican grant and known and recognized to be so held, claimed, and reserved by the United States Land Department.

And the same was put in evidence and the following is a copy thereof:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *June 30th*, 1870.

Register and receiver, San Francisco, Cal.

GENTLEMEN: I am in receipt of register's letter of 24th ult.,
95 submitting the application of Alonzo Flanagan to enter as a pre-emptor S. W. ¼ 20, 3 S., 3 E., embraced in the original survey of Rancho Las Pocitas.

In reply I return the proof submitted, and have to advise you that said rancho claim is yet unadjusted.

You will therefore decline to receive any application whatever for tracts within the exterior boundaries until you shall receive formal notice from this office of the release of the lands from suspension.

Please acknowledge receipt of this as "G," by date.

Very respectfully, JOS. S. WILSON,
Commissioner.

It was here agreed by the parties hereto that on the 23d day of June, 1871, the register and receiver of the U. S. land office at San Francisco, California, received from the Commissioner of the General Land Office an official letter, dated June 14th, 1871, instructing them that the Secretary of the Interior had affirmed the decision of said Commissioner approving the final survey of the Rancho Las Pocitas, and that any land outside of said final survey heretofore held in suspension to await the final determination in the Pocitas case were therefore relieved from such suspension, and to deal with them as other public lands are dealt with.

96 Mr. MULLANY: "I now offer in evidence a certified copy of a map filed in the office of the Secretary of the Interior of the United States on February 27, 1873, by or on the part of the Central Pacific Railroad Company, showing the line of the road as definitely fixed through the county of Alameda and along and through said Mexican grant, Las Pocitas, and showing on its face the Rancho Las Pocitas as delineated on the map already in evidence by the defendant known as the 'Dyer survey,' * * * which embraces the land in controversy in this action. Said map first mentioned also shows on its face surveys of sixteen other Mexican grants on the line of said railroad and lying wholly or partly within the limits of

the congressional grants to the Central Pacific Railroad Company of California, the predecessor of and assignor to the Central Pacific Railroad Company. This map is offered for the purpose of showing that the railroad company had recognized and admitted at that time (which was after the line of the road was definitely fixed and after the road was in operation) that the land in controversy herein was held, included, and claimed as a part of said Mexican grant Las Pocitas. I will have this put in evidence and marked 'Exhibit 16.'"

And the same was put in evidence. (Same map as mentioned in stipulation hereinafter.)

Defendant rests.

Stipulation read in evidence by plaintiff.

97 In the Superior Court in and for the County of Alameda.

W. B. CARR, Plaintiff,
vs.
JOHN QUIGLEY, Defendant.

It is admitted by the defendant in the above-entitled action that original articles of consolidation of the Central Pacific Railroad Company of California and Western Pacific Railroad Company — showing that the said two companies became and were, on the 22d day of June, 1870, consolidated under the name of the Central Pacific Railroad Company, which original articles were filed in the office of the secretary of state on the day and year aforesaid.

The foregoing admission may be read and given in evidence on the trial of this action with the like force and effect as though the original or a duly certified copy thereof were produced and put in evidence, subject, however, to all objections that the said testimony is irrelevant, incompetent, or immaterial, as if taken at the trial.

(Signed) MICH. MULLANY,
Attorney for Defendant.

98 *Stipulation.*

As a part of the statement on motion for a new trial herein, it is hereby stipulated and agreed by and between the parties plaintiff and defendant herein that the tract of land in contest in this action is located within the boundaries of the original deseño or map of said Mexican grant "Las Pocitas," which accompanied said grant made in April, A. D. 1839, and which deseño was presented and filed by José Noriega and Robert Livermore, grantees, in February, A. D. 1854, with the board of land commissioners appointed under the act of Congress approved March 3d, 1851, entitled "An act to ascertain and settle private land claims in the State of California," with their said petition to have said Mexican grant confirmed, and is also located within the boundaries of the (so-called) "Dyer survey" of said rancho of October, A. D. 1865, and made by E. H. Dyer, deputy United States surveyor, and is also within the boundaries of said rancho "Las Pocitas" as laid down on a certain map filed by

the Central Pacific Railroad Company in the office of the Secretary of the Interior of the United States on February 27th, 1873, said map having been filed in said office for the purpose declared by the certificate written thereon and signed by Leland Stanford, president, S. S. Montague, chief engineer, and E. H. Miller, secretary, all of said Central Pacific Railroad Company, and bearing the seal
99 of said company. The declaratory portion of said certificate reads as follows, to wit:

"The annexed map shows the location of the line of route of the Western Pacific railroad from the end of the first 20-mile section (from the city of San José) to the end of the 123.16 mile, measuring from the city of San José, the same being a part of the line or route of said railroad as definitely fixed in compliance with said acts of Congress and in pursuance of the resolution of the board of directors of said company passed on the — day of ——, and that the dates of the field-work thereof are truly indicated along the line from station to station on this map."

The rest and remainder of said certificate consisting only of recitals of the various railroad acts of Congress of the years A. D. 1862 and A. D. 1864, and of subsequent acts amendatory thereof, is here omitted.

It is further stipulated that the diagram and delineation laid down and marked "Las Pocitas rancho" on said map is coextensive with and a copy of the map of the survey of said rancho made by the United States surveyor, E. H. Dyer, in October, 1865, known as the "Dyer survey," and said map does also show delineation of the surveys of numerous other ranchos or Mexican grants of land lying along the line of said railroad and within the limits of the congressional grants of lands to said railroad company made in the
100 years A. D. 1862 and A. D. 1864, the names of which, as shown on said map, are as follows, to wit: "Pala," "Milpitas," "Rincon de los Esteros," "Tularcitos," "Aqua Caliente," "Vale de San José," "Santa Rita," "San Ramon," "Cañada de las Vaquero," "El Pescadero," "Campo de las Franceses," "Sanjon de las Moquelumnes," "Cosumnes," "Omochumnes," "Rio de las Americanos," and "El Paso," and that the land in controversy is outside of the final survey of said Rancho Las Pocitas made by said E. H. Dyer in A. D. 1869 and finally confirmed on June 16th, 1871, and that a small portion (claimed by plaintiff to be $\frac{43}{100}$ of an acre and by defendant to be between 10 and 11 acres) of the lands included within said final survey of said Las Pocitas rancho lying in section 36, township 2 south, range 2 east, of Mount Diablo base and meridian, is not included within said preliminary survey made by said William J. Lewis in A. D. 1854 (B. M. M., D. C. S. C.), and the land in controversy is not within said Lewis survey, so called; that no one of the maps or surveys or field-notes thereof above mentioned need be inserted in the statement on motion for a new trial or in the transcript on appeal, but either one or more of said maps or surveys, with or without the field-notes, may be exhibited and used by either party hereto on the motion for new trial or on the hearing or presentation of the cause in the supreme court of

the State of California or Supreme Court of the United States, and that it shall be sufficient to insert in this statement only one affidavit of the several assistants who are stated as having acted as chainmen and axmen for said William J. Lewis in making
101 his initiatory or preliminary survey of said Las Pocitas rancho in A. D. 1854, as all said affidavits are substantially alike, but any one or more of the omitted affidavits may be used by either party on said motion for new trial or in said supreme courts or either of them.

Dated this 21st day of February, A. D. 1884.

SHAFTER, PARKER & WATERMAN,
Attorneys for Plaintiff.
MICH. MULLANY, *Attorney for Defendant.*

Affidavit of Thomas Brannan, Chainman.

I, Thomas Brannan, having been appointed a chainman in the service of William J. Lewis, deputy surveyor in California, do solemnly swear that in all surveys of public lands or private land claims in which I shall be so employed that I will level the chain in measuring over uneven ground and well and truly plumb the tally pins, whether sticking or dropping the same, and that I will report the true distance to all notable objects and the true lengths of all lines that I may assist in measuring and will mark correctly and distinctly the letters and numbers of all corners that I may be required to mark; that I will faithfully act as required by said deputy from time to time in planting the corner boundaries, whether the same be posts or mounds, either of earth or stone, together with such other service as I shall be called to per-
102 form by said deputy in the discharge of his surveying duties, to the best of my skill and ability, so help me God.

(Signed) THOMAS BRANNAN.

Sworn and subscribed before me, at the house of Robert Livermore, county of Alameda, State of California, this 5th day of May, A. D. 1854.

(Signed) WILLIAM J. LEWIS,
Deputy U. S. Surveyor.

The affidavit of Michael Murry, chainman; Michael Murry, Sr., axman, and Charles Hoffman, flagman, similar to the foregoing, are omitted, as agreed and stipulated between the parties hereto, said affidavits being essentially the same in form and substance.

Additional Affidavits of Thomas Brannan, Michael Murry, Michael Murry, Sr., and Charles Hoffman.

We hereby certify that we assisted Wm. J. Lewis, deputy surveyor, in surveying the Rancho Las Pocitas, and that said rancho has been in all respects, to the best of our knowledge and belief, well

and faithfully surveyed, and the boundary monuments
103 planted according to the instructions furnished by the surveyor general.

(Signed) THOMAS BRANNAN, *Chainman.*
(Signed) MICHAEL MURRY, *Chainman.*
(Signed) MICHAEL MURRY, SR., *Axman.*
(Signed) CHARLES HOFFMAN, *Flagman.*

Subscribed and sworn to by the above-named persons before me, at the house of Robert Livermore, this 5th day of May, 1854.

(Signed) WILLIAM J. LEWIS,
Deputy Surveyor.

No further testimony having been offered by plaintiff or defendant, said cause was argued and submitted to the court for its decision on the 11th day of April, 1883, and thereupon, on the same day, the court ordered judgment for the defendant and ordered the defendant to draw the findings. Afterward, on the eighth day of May, 1883, findings in favor of the defendant were signed by the judge of said court, and on the same day duly filed in said cause, deciding that the defendant was entitled to judgment for his costs.

The plaintiff in this cause having been duly notified of the rendition of said decision, and having filed and served upon de-
104 fendant within the time required by law a notice of his intention to move for a new trial, designating therein the grounds upon which the new trial would be made, and that the motion would be made upon a statement of the case, and the time for preparing and serving said statement having been duly extended to and including the eighth day of April (B. M. M., D. C. S. C.), 1884, by and between the parties, the plaintiff now moves this honorable court for a new trial upon the following grounds, to wit:

Specifications of Errors of Fact.

The evidence is insufficient to justify the 11th finding of fact and the decision herein for the following reasons:

First. The evidence does not show that the land in controversy was held or claimed as a part of the Mexican grant Las Pocitas continually or at all from the 10th day of April, 1839, until the 6th day of June, 1871, nor does it show that the land in controversy first became public land on said 6th day of June, 1871, or at all. On the contrary, the evidence shows that said land was, on the 30th day of January, 1865, by the Secretary of the Interior, withdrawn from location, pre-emption, homestead, private entry, and sale in accordance with the laws of Congress.

Second. The evidence shows that the land in controversy never has been public land, subject to settlement thereon of defendant as a pre-emption settler and claimant.

105 Third. The evidence shows that on the 30th day of January, 1865, said land was withdrawn from pre-emption and reserved for railroad purposes by the proper officers of the Govern-

ment of the United States, duly authorized so to do by the laws of Congress.

Fourth. The evidence shows that the said land was never claimed by the grantees of the Mexican grant Las Pocitas to be within the exterior boundaries of said grant.

Fifth. The evidence shows that the grantees of said Mexican grant, Las Pocitas, as early as the year 1855, caused a public survey thereof to be made by the surveyor general of the State of California, under the laws of the United States, and the said grantees caused said lands to be excluded from the two leagues to which they were entitled under the grant and from the four leagues which were surveyed, and then and there disclaimed any right, title, or interest in the said land.

Sixth. The evidence shows that the grantees of the Mexican government, as shown by finding No. 1, while they were in the possession of said land so granted to said Noriega and Robert Livermore, caused a survey of said grant to be made in the year 1854 by the surveyor general of the State of California, and that while the survey was so being made the said grantees were present and the owners of the surrounding ranches were present, and all parties interested agreed upon the initial point of survey, and from and to said point the lines of said survey were run upon the land
106 so as to include exactly four leagues of land within the exterior boundaries of said Mexican grant; that said grantees then and there, after said four leagues had been so set apart, expressed themselves satisfied with the lines of said survey and that they included all the land they claimed and approved of the same, and ever afterwards acquiesced in the said survey so made, which was known as the "Lewis survey," as contradistinguished from a survey made by one Dyer, mentioned in the findings in this action; that the land described in the complaint herein was not included within said four leagues, but was excluded therefrom and lies outside the exterior boundaries of said Lewis survey (so called) and within the exterior boundaries of the survey so made by said E. H. Dyer, as stated in the findings herein; that the survey so made by said surveyor general and known as the Lewis survey was afterwards, on the — day of ——, by the officers of the United States Land Department, Washington, D. C., held and adjudged to be a legal and valid and subsisting survey, and that said Noriega and Livermore and their grantees were estopped from questioning the validity or integrity of the same.

Second Specification of Error in Fact.

The evidence is insufficient to justify the 13th and 14th
107 findings of fact, respectively, and the decision in favor of the defendant herein, for the reasons given, respectively, under the first specification of error of fact aforesaid why the evidence is insufficient to justify the eleventh finding of fact; also for the following additional reasons:

A. Because the evidence does not show that said defendant ever

appealed from the decision of the register and receiver, or either of them, refusing to allow him, the said defendant, to file his declaratory statement of his intention to pre-empt said land.

B. Because the evidence shows that at the time the defendant offered to file his declaratory statement as a pre-emptor the Government of the United States had no title to said land.

C. Because the evidence shows that at the time of the entry of the defendant into the possession of said land the plaintiff held the legal title to said land, and was in the constructive possession thereof under the deeds mentioned in the 15th finding herein, and it then had ceased to be public land.

D. Because the evidence shows that on the 7th day of May, 1874, the United States of America had granted said land described in the complaint herein, in manner and form as set out in the 15th finding herein, to the Central Pacific Railroad Company (a corporation duly organized under the laws of the State of California), and that the plaintiff, at the time this action was commenced, held title in fee simple to said lands as the successor in interest to said corporation.

108 And that the defendant never had or claimed to have had any right to or interest in or to be in possession of said land prior to the month of October, 1877.

Third Specification of Error in Fact.

The evidence is insufficient to sustain the 18th finding of fact herein or any fact therein found, and the same is not warranted by the evidence for the reasons stated and given, respectively, under the first and second specified terms of error of fact, respectively.

Errors in Law.

Hereunder the plaintiff specifies the errors of law occurring at the trial and excepted to by the plaintiff:

First. The court erred in allowing the defendant, after said United States patent was put in evidence by plaintiff, to introduce any evidence on his part to establish any right, title, or interest in or possession to said land in hostility to the title derived to the plaintiff under said letters patent set out in finding number 15 herein.

The court erred in admitting or considering any of the evidence offered by defendant to contradict or to avoid the United States patent, because the said United States patent was conclusive

109 evidence of the plaintiff's right to recover in this action; also because said evidence was incompetent and irrelevant for any purpose.

Second. The court erred in receiving and considering any evidence on the part of the defendant questioning the validity of the deed from the Government of the United States to the Central Pacific Railroad Co., because the defendant did not by any evidence in the case show himself to have been in privity with the para-

mount source of title. The decision is against the evidence for the several reasons given under the first specification of error of fact.

The court erred in rendering a decision against the plaintiff after having received as evidence in the case all the testimony offered by the plaintiff.

The evidence is insufficient to justify the decision for the reasons stated respectively under the second specification of error of fact.

The evidence is insufficient to sustain either one of the conclusions of law found herein by the court for the following reasons:

A. That the evidence shows that the land in controversy never was public land or subject to pre-emption.

B. That it never was reserved for the satisfaction of the Mexican grant Las Pocitas.

C. That it was not land reserved from the grant of lands under the acts of Congress to the Western Pacific railroad.

110 D. That the form of patent and the patent itself issued to the Central Pacific railroad was with authority of law and valid.

E. That the deed to the plaintiff did convey a good title in fee simple.

F. That the defendant has been continually a trespasser upon said land and unlawfully in possession thereof.

G. That at the time of the commencement of this action the plaintiff was the owner in fee simple of said land and entitled to the possession thereof.

The court erred in rendering a decision in favor of the defendant for the reasons last stated aforesaid.

SHAFTER, PARKER & WATERMAN,
Attorneys for the Plaintiff.

111 (Title of Court and Cause.)

Certificate of Settlement of Statement.

The foregoing statement of the case is hereby settled, signed, and certified to as true and correct this 2d day of April, A. D. 1884, at the court-house of said county of Alameda and within the time as agreed by and between said parties, plaintiff and defendant.

(Signed) A. M. CRANE, *Judge.*

(Title of Court and Cause.)

Order Denying Motion for New Trial.

In open court April 2d, 1884.

Present: Hon. A. M. Crane, judge.

On this day the motion for a new trial on behalf of said plaintiff, Wm. B. Carr, came on regularly to be heard on the statement of the case on file herein, and said motion having been argued and presented by Messrs. Shafter, Parker and Waterman, for said plaintiff, and Mich. Mullany, for said defendant, and the motion having been

submitted and fully considered, it is ordered that said motion for a new trial be, and the same is hereby, refused and denied.

112 (Title of Court and Cause.)

Notice of Appeal.

You will please take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of the State of California from the order of said superior court denying plaintiff's motion for a new trial made on the 2d day of April, A. D. 1884, and from the judgment therein entered in the said superior court on the 14th day of May, A. D. 1883, in favor of the defendant, John Quigley, and against the plaintiff, W. B. Carr, in said action, and from the whole thereof.

Dated this 2d day of April, A. D. 1884.

SHAFTER, PARKER & WATERMAN,
Attorneys for Plaintiff.

To the clerk of said superior court and Michael Mullany, attorney for defendant.

Service and receipt of a copy of the foregoing notice admitted after filing this 2d day of April, A. D. 1884.

MICH. MULLANY,
Attorney for Defendant.

(Endorsed:) Filed April 2d, 1884. Truman H. Allen, county clerk, by W. R. Thomas, deputy clerk.

113 (Title of Court and Cause.)

It is hereby stipulated that Messrs. Shafter, Parker and Waterman were substituted as attorneys for said plaintiff in the place of Wm. Irvine, Esq., prior to the filing and service of the notice of intention to move for a new trial by said plaintiff, and that said Messrs. Shafter, Parker and Waterman were such attorneys for plaintiff during all the times that they have acted as such attorneys.

MICH. MULLANY,
Attorney for Defendant.

(Title of Court and Cause.)

Stipulation.

It is hereby stipulated and agreed that the foregoing constitutes the transcript on appeal taken herein by plaintiff, and that an undertaking on appeal in due form has been properly filed herein.

Dated April —, A. D. 1884.

SHAFTER, PARKER & WATERMAN,
Atty's for Appellant.

MICH. MULLANY, *Attorney for Respondent.*

114 Out. B. M. M., D. C. S. C.

115 (Title of Court and Cause.)

Certificate.

We, the undersigned, the attorneys for the respective parties hereto, do stipulate and certify that the foregoing is a correct transcript of the original papers on file in said cause and of the orders therein made and entered on the minutes of the said court, and that the same shall constitute the transcript on appeal herein.

Dated this 15th day of April, A. D. 1884.

(Signed) SHAFTER, PARKER & WATERMAN,
Attorneys for Plaintiff and Appellant.

(Signed) MICH. MULLANY,
Attorney for Defendant and Respondent.

116 Service hereof by copy is admitted this 15 day of April, 1884.

(Signed) MICH. MULLANY,
Attorney for Defendant.

117 *Submission of Cause.*

In the Supreme Court, State of California, Department One.

CARR *vs.* QUIGLEY. } 9531.

1886.

Nov. 23.—Appellant allowed 20 days to file brief, respondent 20 days to answer, appellant 10 days to reply thereto. Cause to be submitted.

Title of Court and Cause.

1887.

Feb'y 17.—Ordered heard in bank.

BY THE CHIEF JUSTICE.

Title of Court and Cause.

1887.

Aug. 11.—Ordered respondent be allowed 20 days to file brief, appellant 10 days to reply. Cause to be thereon submitted.

118 Title of Court and Cause.

1887.

Sept. 17.—Filed appellant's reply and submitted.

119 In the Supreme Court of the State of California. In Bank.

W. B. CARR, Appellant, *vs.* JOHN QUIGLEY, Respondent. } No. 9531. On Appeal from the Superior Court in and for the County of Alameda.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and sin-

gular the law and premises having been fully considered, the opinion of the court herein is delivered by the court.

I dissent.

PATERSON, *J.*

Whereupon it is adjudged and decreed by the court that the judgment and order of the superior court in and for the county of Alameda in the above-entitled cause be, and the same are hereby, affirmed.

120 Title of Court and Cause.

1888.

Jan. 18.—Filed petition for rehearing.

Title of Court and Cause.

1888.

Jan. 18.—Rehearing granted.

THE COURT.

Title of Court and Cause.

1888.

Oct. 1.—Ordered continued to January, 1889.

Title Court and Cause.

1889.

Jan. 16.—Argued and submitted.

121 In the Supreme Court of the State of California. In Bank.

W. B. CARR, Appellant, *vs.* JOHN QUIGLEY, Respondent. } No. 9531. On Appeal from the Superior Court in and for the County of Alameda.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by Thornton, J. We concur: Works, J.; Sharpstein, J.; McFarland, J. Concurring opinion: Beatty, C. J. Dissenting opinion: Paterson, J.

Whereupon it is adjudged and decreed by the court that the judgment and order of the superior court in and for the county of Alameda in the above-entitled cause be, and the same are hereby, affirmed.

122 *Opinion.*

Supreme court decision.

In bank.

(Filed May 1, 1889.)

CARR *vs.* QUIGLEY. } No. 9531.

We regard the contention of appellant, Carr, in this case as settled by the decision of the Supreme Court of the United States in Doolan *vs.* Carr, 125 U. S., 618, and by the decisions of this court made prior to the judgment in Doolan *vs.* Carr, viz: Carr *vs.* Quigley, 57 Cal., 394, and McLaughlin *vs.* Head, 63 *id.*, 208.

The same points were presented in Doolan *vs.* Carr that are presented in this case and with reference to the same Mexican grant of Las Pocitas. The only difference is that in Doolan *vs.* Carr the points arose and were presented on an offer of testimony, and here they arise on the proof of the facts which Doolan offered to prove in his suit against Carr.

In our judgment, there is no error in the record, and the judgment and order must be affirmed.

So ordered.

THORNTON, *J.*

We concur:

SHARPSTEIN, *J.*
McFARLAND, *J.*
WORKS, *J.*

Concurring Opinion.

I concur in the judgment of affirmance upon the sole ground that what is here decided has become, by virtue of the decision on the former appeal (57 Cal., 394), so far as this court is concerned, the law of the case.

BEATTY, *C. J.*

Dissenting Opinion.

Doolan *vs.* Carr, cited by Mr. Justice Thornton, seems upon its face to be decisive of this case, and were it not for other and more recent decisions of the national courts I should entertain no doubt that the contention of appellant herein had been settled by the decision in the first case above named.

In United States *vs.* McLaughlin, 127 U. S., 428, the Supreme Court of the United States considered the different kinds of Mexican grants and reviewed at length the case of Newhall *vs.* Sanger and Leavenworth R. Co. *vs.* United States, upon which Doolan *vs.* Carr was largely based. The court there held that "grants of quantity,

as of one or more leagues, within a larger tract, described by what are called 'outside boundaries' are 'floats," to be located by the consent of the Government before they can attach to any specific land, like the land warrants of the United States, and that in the case of floating grants it was only 'the quantity actually granted which was reserved during the examination of the validity of the grant. The remainder was at the disposal of the Government as a part of the public domain. If within the boundaries of a land grant made in aid of a railroad such land grant would take effect, except as to the quantity of land or float actually granted in the Mexican grant. If that quantity lying together was left to satisfy the grant the railroad company would be entitled to patents for the odd sections of the remainder. * * * The government (Mexican) retained the right of locating the quantity granted in such part of the larger tract described as was fit, and the Government of the United States succeeded to the same right; hence the Government might dispose of any specific tracts within the exterior limits of the grant, leaving a sufficient quantity to satisfy the float. * * * There is really nothing in the decision of Newhall *vs.* Sanger in conflict with the views here expressed, but the court did not have before it the case of a float grant."

It seems to me that Las Pocitas must be regarded as a "float" within the meaning of that term as used in the decisions. The grant by the Mexican government to Livermore was of a certain tract of land known by the name of "Las Pocitas," designated and described as follows: "Bounded on the north by Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the line of the establishment of San José, and on the west by the rancho of Don José Dolores Pacheco, containing in all two square leagues, a little more or less, provided that the quantity be contained within the said boundaries, and if less than that quantity be found to be contained therein, then that less quantity and all of said described tract of land." In an official letter to the register and receiver of the San Francisco land office, dated May 3, 1873, Hon. Willis Drummond, Commissioner of the U. S. Land Office, referring to the description of land in the grant, says: "This grant recites that 'whereas Don José Noriega and Robert Livermore have petitioned for their own benefit and that of their families the place known by the name of Las Pocitas, which is in the Willow Grove de la Agua, so far as the mountain range of Buenos Ayres and the hills of Las Cuevas,' I have thought proper to grant them said place. The land of which donation is made is of two leagues, a little more or less, as the deseño annexed to the proceedings, with its respective limits, explains. The judge who shall give possession will give the same to be measured agreeably to ordinance in marking the boundaries, leaving the excess which might result to the nation for such uses as may be deemed convenient." "The grant, being a part of the Mexican archives, is a public document of which we take notice." (Byrne *vs.* Alas, 74 Cal., 637.)

The grant has always been treated as a float. It was so considered by Livermore himself, the donee. It has been so treated by the

land officers, by the courts, and by all persons interested in a determination of its location and boundaries. It has never been contended by any one, as I understand it, that the grant was for all the land contained within the natural "outside boundaries" of the deseño mentioned in the grant. The land in controversy is within the outside boundaries, but is not included in the tract finally set off, patented to, and accepted by the donees named in the grant. It is therefore the same in character as that which was under consideration in United States *vs.* McLaughlin, *supra*. Counsel for respondent contends that the only question before the court in United States *vs.* McLaughlin was as to the eastern boundary line of the grant. In this I think he is mistaken. After finding that the grant did not extend east of the Jack Tone road or the edge of the hills commencing near the same, the court said: "This result would dispose of the present case with regard to nearly all the land in question, but as some of it lies west of said road in range 7, and as the railroad grant extends to the west of said road, it will be necessary to examine the other question referred to, namely: If the lands in controversy did lie within the exterior limits of the Moquelamos grant, and if the title of the railroad company did accrue whilst that grant was under consideration in the courts, did those facts prevent the railroad grant from taking effect?" And the court there decided that in the case of floating grants "it was only the quantity actually granted which was reserved during the examination of the validity of the grant. The remainder was at the disposal of the Government as part of the public domain;" that if there was left sufficient to satisfy the grant "the railroad company would be entitled to patents for the odd sections of the remainder;" that "if the Government has the right to say where it (the grant) shall be located it certainly has the right to say where it shall not be located, and if it sells land to a third person at a place within the general territory of the original grant it is equivalent to saying that the quantity due to the original grantee is not to be located there. In other words, if the territory comprehended in the outside limits and bounds of a Mexican grant contains eighty leagues the government may dispose of seventy leagues without doing any wrong to the original grantee."

The case before us is one which may, and probably will, go to the Supreme Court of the United States; therefore the decision of that court is binding and conclusive upon us on the questions which have been decided by it.

I am led to the conclusion that the Supreme Court of the United States, when this case is presented to it as fully as it is presented here—that is, upon the evidence, and not upon a broad and sweeping offer, as was the case of Doolan *vs.* Carr, will hold that the Las Pocitas is a "float," by a decision of the circuit court of the United States for the northern district of California, in United States *vs.* Curtner, decided February 4, 1889. In that case it was held that the Las Pocitas was a "float;" that "the railroad company by the acts of 1862 and 1864 had a valid grant to every odd section of land within twenty miles on each side of the road and within the exterior

bounds of the Las Pocitas grant not embraced within two leagues, as it was finally located, and not reserved, etc.;" that the decision in Newhall *vs.* Sanger has been materially limited in its operation by the recent decision in United States *vs.* McLaughlin.

In this decision of the circuit court Mr. Justice Field, who participated and acquiesced in the decisions in Doolan *vs.* Carr and United States *vs.* McLaughlin, concurred.

It seems to me quite clear either that the record in Doolan *vs.* Carr was not such as to indicate the true character of the Las Pocitas grant, that the offer of proof made therein was too broad to present the question whether the grant was in fact a float, or that that question was overlooked or not presented for the consideration of the court therein.

In view of the decisions of the national courts in United States *vs.* McLaughlin and United States *vs.* Curtner, *supra*, I do not think that the decision of this cause on the former appeal can be regarded as the "law of the case." It is useless to apply a rule of decision which will not be regarded by the higher tribunal. (Belcher *vs.* Chambers, 53 Cal., 635.)

I think, therefore, that the judgment and order should be reversed.

PATERSON, *J.*

123 In the Supreme Court of the State of California.

W. B. CARR, Plaintiff,
vs.
JOHN QUIGLEY, Defendant.
} (Assignment of Error.)

The plaintiff, W. B. Carr, assigns and specifies the following errors committed by said supreme court in its decision and judgment rendered and entered herein May 1, 1889, namely:

1. The court erred in holding that the land in controversy in this action was reserved and excepted from the grant of lands made to the Western Pacific Railroad Company by acts of Congress, known as the Pacific Railroad acts, by reason of said land being located within the exterior boundaries of the Mexican grant "Las Pocitas," and that the patent issued by the United States
124 to the plaintiff's grantor, the Central Pacific Railroad Company, was therefore issued without authority of law and was and is void, because it appears from the record in this case that said Mexican grant was a grant of quantity only, namely, "two square leagues, a little more or less," to be segregated from the ten or more square leagues of lands embraced within said exterior boundaries, said quantity of two leagues granted and confirmed to the Mexican grantees being a mere float until the same should be segregated and located by authority of the United States, which was accordingly done, and such segregation and location became final on the 6th day of June, 1871. Therefore the court erred in holding that said land was reserved from said grant to said company, and that said patent and deed are void.

125 2. The court erred in holding that this case is like that of Doolan *vs.* Carr, because in that case the record stated that said Mexican grant "Las Pocitas" was a grant of all the land within the boundaries named, whereas in this case the record shows that said grant was of about one-fifth only of the quantity of land within said boundaries, and therefore a float.

Wherefore the plaintiff prays that the decision and judgment herein be reversed.

SHAFTER, PARKER & WATERMAN AND
J. W. HARDING, *Attorneys for Plaintiff.*

[Endorsed:] No. 9531. Supreme court of California. W. B. Carr *v.* John Quigley. Assignment of error. Service of a copy hereof admitted this May 29th, 1889. Mich. Mullany, defendant's attorney. Endorsed: Filed May 31st, 1889. J. D. Spencer, clerk, by Ben. M. Maddox, deputy. Shafter, Parker & Waterman and J. W. Harding, pl'ff's att'ys.

126 *Bond.*

In the Supreme Court of the State of California.

W. B. CARR, Plaintiff in Error,
vs.
JOHN QUIGLEY, Defendant in Error.

Know all men by these presents that we, Irwin C. Stump and C. W. McAfee, are held and firmly bound unto John Quigley, said defendant in error, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said John Quigley, his executors or administrators; to which payment, well and truly be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this first day of June, A. D. 1889.

127 Whereas the above-named W. B. Carr has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the action entitled W. B. Carr, plaintiff, *vs.* John Quigley, defendant, by the supreme court of the State of California on the first day of May, A. D. 1889:

Now, therefore, the condition of this obligation is such that if the said William B. Carr, plaintiff in error, shall prosecute his said writ of error to effect and answer all damages and costs if he fail to make good his plea and complaint, then this obligation shall be void; otherwise to remain in full force and virtue.

IRWIN C. STUMP. [SEAL.]
C. W. McAFEE. [SEAL.]

Acknowledged, signed, sealed, and delivered in presence of—
J. R. HOWELL.

128 UNITED STATES OF AMERICA, } ss:
State of California, }

Irwin C. Stump and C. W. McAfee, being duly sworn, each for himself deposes and says that he is a resident and freeholder in the State of California and is worth the sum of five hundred dollars, lawful money of the United States of America, over and above all his just debts and liabilities, exclusive of property exempt from execution.

IRWIN C. STUMP.
C. W. McAFEE.

Subscribed and sworn to before me this first day of June, A. D. 1889.

[SEAL.] HENRY C. DROGER,
Notary Public.

129 The form and amount of the foregoing bond and the sufficiency of the sureties thereto are hereby approved.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

Attest: J. D. SPENCER,
Clerk Supreme Court, State of California,
[SEAL.] By BEN. M. MADDOX, *Deputy.*

[Endorsed:] 9531. Supreme court of California. Wm. B. Carr *v.* John Quigley. Bond on writ of error. Filed —— —th, 1889. Endorsed: Filed June 3, 1889. J. D. Spencer, clerk, by Ben. M. Maddox, deputy.

130 UNITED STATES OF AMERICA, *ss:*

To John Quigley, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1889, pursuant to a writ of error issued by the Supreme Court of the United States and allowed by the supreme court of the State of California, transferring said suit entitled W. B. Carr, plaintiff, *vs.* John Quigley, defendant, from said supreme court of the State of California to the Supreme Court of the United States, in which suit W. B. Carr is plaintiff in error and you, the said John Quigley, are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not
131 be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. H. Beatty, chief justice of the
[SEAL.] supreme court of the State of California, this third day of June, A. D. 1889, and of the Independence of the United States the one hundred and thirteenth.

W. H. BEATTY,
Chief Justice.

Attest: J. D. SPENCER,
Clerk Supreme Court, State of California,
By BEN. M. MADDOX, *Deputy.*

Endorsed: United States Supreme Court. W. B. Carr, pl'ff in error, *vs.* John Quigley, def't in error. Citation. Service of the within citation admitted June 3d, 1889. Mich. Mullany, att'y for John Quigley, def't in error. Filed June 3, 1889. J. D. Spencer, clerk, by Ben. M. Maddox, deputy.

132 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of California, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea and complaint in the said suppreme court of the State of California, said court being the highest court of law or equity of the said State in which final decision could be had, in a certain suit between W. B. Carr, plaintiff in error, and John Quigley, defendant in error, wherein the title to a certain tract of land situate in the State of California was in issue, said land being claimed by the plaintiff under and by virtue of a patent issued by the United States of America to the plaintiff's grantor, the Central Pacific Railroad Company, and wherein the decision and judgment of said supreme court of California was against the validity of the plaintiff's title to said land so specially claimed under said patent to have been granted to plaintiff's grantor by an act of Congress of the United States of America, said patent having been declared by said decision and judgment to be invalid and void, by reason whereof a manifest error hath happened, to the great damage of the plaintiff, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your
seal, distinctly and openly, you send the record and proceed-
133 ings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said Supreme Court of the United States to be then and there held, that, the record of proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 29th day of May, A. D. 1889, and of the Independence of the United States of America the one hundred and thirteenth.

Seal U. S. Circuit Court, Northern Dist. Cal.

L. S. B. SAWYER,
Clerk U. S. Circuit Court, Nor. Dist. Cal.

The above writ of error is hereby allowed.

W. H. BEATTY,
Chief Justice Supreme Court of California.

[Seal Supreme Court of California.]

Attest:

J. D. SPENCER,
Clerk Supreme Court, State of California,
By BEN. M. MADDOX, *Deputy.*

134 [Endorsed:] Original. 9531. United States Supreme Court. W. B. Carr, pl'ff in error, *vs.* John Quigley, def't in error. Writ of error. Received a copy of the within writ of error, and service of the same is hereby admitted. ——, 1889. —— ——, att'y for def't in error, John Quigley. Filed June 3, 1889. J. D. Spencer, clerk, by Ben. M. Maddox, deputy.

135 *Clerk's Certificate.*

In the Supreme Court of the State of California.

W. B. CARR, Plaintiff in Error,
v.
JOHN QUIGLEY, Defendant in Error.

I, J. D. Spencer, clerk of the supreme court of the State of California, do hereby certify that the foregoing one hundred and thirty-three pages, numbered from one to one hundred and thirty-three, both numbers inclusive, contain a full, true, and correct transcript of the proceedings in the cause above entitled, and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of the said supreme court this third day of September, 1889.

Seal Supreme Court of California.

J. D. SPENCER, *Clerk,*
By BEN. M. MADDOX, *Deputy.*

Endorsed on cover: Case No. 13,876. California supreme court. No. 259. W. B. Carr, plaintiff in error, *vs.* John Quigley. Filed October 22, 1889.

APR
JAMES H.
CLERK

IN THE

Supreme Court of the United States.

No. 259. OCT. TERM, 1892.

WM. B. CARR,
Plaintiff in Error,
vs.
JOHN QUIGLEY,
Defendant in Error.

ARGUMENT ON BEHALF OF DEFENDANT IN ERROR.

MICH. MULLANY,
Counsel for Defendant in Error.

Thomas' Printing House, 207-209 Sacramento St.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 29th day of May, A. D. 1889, and of the Independence of the United States of America the one hundred and thirteenth.

Seal U. S. Circuit Court, Northern Dist. Cal.

L. S. B. SAWYER,
Clerk U. S. Circuit Court, Nor. Dist. Cal.

The above writ of error is hereby allowed.

W. H. BEATTY,
Chief Justice Supreme Court of California.

[Seal Supreme Court of California.]

Attest:

J. D. SPENCER,
Clerk Supreme Court, State of California.
By BEN. M. MADDOX, *Deputy.*

134 [Endorsed:] Original. 9534. United States Supreme Court. W. B. Carr, pl'ff in error, vs. John Quigley, def't in error. Writ of error. Received a copy of the within writ of error, and service of the same is hereby admitted. ——, 1889. ——— ———, att'y for def't in error, John Quigley. Filed June 3, 1889. J. D. Spencer, clerk, by Ben. M. Maddox, deputy.

135 *Clerk's Certificate.*

In the Supreme Court of the State of California.

W. B. CARR, Plaintiff in Error,
vs.
JOHN QUIGLEY, Defendant in Error.

I, J. D. Spencer, clerk of the supreme court of the State of California, do hereby certify that the foregoing one hundred and thirty-three pages, numbered from one to one hundred and thirty-three, both numbers inclusive, contain a full, true, and correct transcript of the proceedings in the cause above entitled, and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of the said supreme court this third day of September, 1889.

Seal Supreme Court of California.

J. D. SPENCER, *Clerk,*
By BEN. M. MADDOX, *Deputy.*

Endorsed on cover: Case No. 13,876. California supreme court. No. 259. W. B. Carr, plaintiff in error, vs. John Quigley. Filed October 22, 1889.

Office Supreme Court U. S.
FILED.
APR 11 1893
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

No. 259. OCT. TERM, 1892.

WM. B. CARR, *Plaintiff in Error,*

vs.

JOHN QUIGLEY, *Defendant in Error.*

ARGUMENT ON BEHALF OF DEFENDANT IN ERROR.

MICH. MULLANY,
Counsel for Defendant in Error.

Thomas' Printing House, 207-209 Sacramento St.

In the Supreme Court

OF THE

UNITED STATES.

WM. B. CARR,
Plaintiff in Error,
vs.
JOHN QUIGLEY,
Defendant in Error.

Argument on Behalf of Defendant in Error.

STATEMENT OF THE CASE.

Error to the Supreme Court of California.

Action by plaintiff (in error) to recover possession of a certain ¼-section, (160 acres) of land in Alameda County, California, from the defendant (in error).

Plaintiff seeks to recover solely on the strength of his alleged *title* to the land sued for. (Rec. pp. 1 and 2, fols. 3 and 4).

The defendant answered:

1st. That plaintiff does not own the land sued for, and that he has not, and never had any title thereto; and that plaintiff has not suffered any damage by reason of defendant's entry. (Rec. p. 2, fols. 5–6).

2d. A statement of certain facts from which it is claimed the legal conclusion follows, that plaintiff has not, and never

had, any title to the land; which facts will come under notice hereafter; and a further statement of facts showing that defendant is, and has always been rightfully and lawfully in possession of the land sued for; which facts will also come under notice hereafter. (Rec. pp. 2-5, fols. 6-11).

On the trial, the plaintiff put in evidence a patent (in form) to the Central Pac. R. Co., as successor in interest of the Western Pac. R. Co., which purports to have been issued under the Pacific R. Acts, so-called, of July 1, 1862, and July 2, 1864, and a deed of conveyance from the Central Pac. R. Co. to himself, both of which contain a description of the land sued for; and then rested. (Rec. pp. 14–15, fols. 29–32).

The trial court found and decided from the evidence adduced on the trial,

First: That on April 10, 1839, the Mexican Government granted to Jose Noriega and Robert Livermore a certain tract of land known by the name, "Las Pocitas," which tract so granted was designated and described as follows, viz: bounded on the north by the Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the establishment of San Jose, and on the west by the rancho of Don Jose Dolores Pacheco, containing in all two square leagues, a little more or less, provided that quantity be contained within the said boundaries; and if less than that quantity be found to be contained therein, then that less quantity, and all of said described tract of land.

Second. That the Departmental Assembly of the Mexican Government confirmed said grant on May 22, 1840.

Third. That on Feby. 27, 1852, said Noriega and Livermore petitioned the board of land commissioners, appointed

under the provisions of the Act of Congress, approved March 3, 1851, entitled "An Act to ascertain and settle the private land claims in the State of California," to have said grant confirmed; and on Feby. 14, 1854, the said Board duly confirmed the same to said Noriega and Livermore, their heirs and assigns; and, by the decree of confirmation, described the said grant as follows, viz: "Bounded on the north by the Lomas de las Cuevas; on the east by the Sierra de Buenos Ayres; on the south by the dividing line of the establishment of San Jose; and on the west by the rancho of Don Jose Dolores Pacheco; containing in all two square leagues, a little more or less, provided that quantity be contained within the boundaries named; and if less than that quantity be contained therein, then that less quantity is hereby confirmed."

Fourth. That the U. S. district court for the northern district of California, on appeal to it from said decree of said board of land commissioners, and upon the records and evidence which were adduced before it, duly confirmed said grant to said Noriega and Livermore, their heirs and assigns, on Feby. 18, 1859, to the same extent and for the same quantity of land, and by the same description, and under the same conditions as the said board of land commissioners had done, and in all things affirmed the decree of said board.

Fifth. That the Supreme Court of the U. S. affirmed said decree of said district court and every part thereof on Jany. 14, 1861, viz: at the December term, 1860; and the mandate from said Supreme Court was presented to and filed in said district court on Feby. 24, 1865; and, upon the filing of said mandate, an order was made and entered by said district court that said claimants (viz: Noriega and

Livermore, their heirs and assigns) be allowed to proceed under the decree of said district court as under final decree.

Sixth. That the land in controversy herein forms part of the tract, and lies within the boundaries designated and set forth in the said decrees of the board of land commissioners and the U. S. district court, and affirmed by the United States Supreme Court. (Rec. pp. 15–16, fols. 33–5).

Seventh. That Sept. 21st, 1865, the U. S. surveyor-general for California authorized and ordered one E. H. Dyer, a deputy U. S. surveyor, to make a survey of said rancho Las Pocitas, within the boundaries so designated and set forth in said decrees of the board of land commissioners and of said U. S. district court; and said deputy U. S. surveyor did accordingly make a survey, field notes and plat of said grant, Las Pocitas, in Oct., 1865, and the same were duly returned; and on the 8th day of Feby., 1867, said survey, field notes and plat were approved by the U. S. surveyor-general, and on the day of July, A. D. 1868, the same were approved by the Commissioner of the General Land Office of the U. S.

Eighth. That the land described in the Complaint and in controversy herein, is included within and forms part of the tract of land so surveyed and platted by said E. H. Dyer, deputy U. S. Surveyor.

Ninth. That on the 30th day of July, 1868, the Secretary of the Interior disapproved of said survey and plat, so made by said E. H. Dyer, because the same continued more than two square leagues, and directed that a new survey be made of said grant, which should contain but two square leagues of land.

Tenth. That in March, 1869, the U. S. surveyor-general for California proceeded under said instructions of the Secretary of the Interior (received through the Com. of the General Land Office), and caused said grant to be again surveyed by said E. H. Dyer, deputy U. S. surveyor, within the boundaries designated and set forth in said decrees of confirmation, and a plat and field notes of said survey were returned and the same were approved by the U. S. surveyor-general, on the 11th day of May, 1870, and were approved by the Com. of the General Land Office, on the 1st day of March, 1871, and were approved by the Secretary of the Interior on the 6th day of June, 1871, on which last named day said survey and plat became final; and on the 20th day of Aug., 1872, a U. S. patent was issued to the grantees of said Mexican grant, their heirs and assigns, for the land so surveyed and platted, in March, 1869. And the land in controversy is not included in the tract so surveyed and platted in March, 1869, and patented on Aug. 20th, 1872.

Eleventh. That the land described in the complaint and in controversy herein was held and claimed as a part of said Mexican grant, Las Pocitas, continually from the 10th day of April, 1839, until the 6th day of June, 1871; and on said last named day it first became public land of the U. S., and it has ever since been and is now public land, subject only to the settlement of defendant thereon as a preëmption settler and claimant.

Twelfth. That the township plat of the U. S. survey, embracing the land in controversy, was filed in the U. S. Land Office on June 27, 1871, where it has ever since been and is.

Thirteenth. That in Oct. 1877, defendant entered into possession of the land as a preëmption settler under the U.

S. laws, and erected his dwelling house and other improvements; and his qualifications as a pre-emptor are fully found to be all that the law demands. (Rec. pp. 8-9, fol. 19; and p. 17-18, fol. 37-8).

Fourteenth. That while so settled and residing on the land, and in the exclusive possession thereof, defendant presented his declaratory statement of his intention to preempt the same, in due form as prescribed by the laws of the U. S., to the Reg. and Rec. of the proper U. S. Land Office, and tendered the legal fees and requested that the same be accepted: but the officers refused to accept the same, and he has ever since been and is ready and willing to preëmpt the land as a settler and pay the U. S.

Fifteenth. That the only claim of right or title plaintiff ever had or has to the land in controversy is that it was granted to the Western Pac. R. Co. under the Pac. R. R. Acts of July 1, 1862 and July 2, 1864, and that on May 7, 1874, a patent was issued by the officers of the U. S. Land Department to the Central Pac. R. Co., as successor of the Western Pac. R. Co., and a deed of conveyance from the Central Pac. R. Co. to himself, dated June 10, 1874, (a copy of the patent is set forth at length).

Sixteenth. That the line of the road of the Western Pac. R. Co. from San Francisco to Sacramento, including that portion of it which runs through Alameda county, was definitely fixed, and a map of the same was filed with the Secretary of the Interior on the day of Jany., 1865, and prior to the 30th day of Jany., 1865, under and for the purposes of the Pac. R. R. Acts of July 1, 1862, and July 2, 1864, and that the R. R. was completed and in full operation prior to the 1st day of June, 1869.

Seventeenth. That on Jany. 30, 1865, the Secretary of the Interior caused the lands within the limits designated by the Act of Congress of July 1, 1862, and the Act amendatory thereof, subject to the operation and provisions of said acts to be withdrawn from preëmption, private entry and sale; and the land in controversy is within the limits of said withdrawal.

Eighteenth. That plaintiff was not, on Dec. 22, 1877, and has not since been and is not the owner or siezed in fee simple or possessed or entitled to the possession of the land; and defendant did not oust plaintiff, and is rightfully in possession of the land.

From these facts, the Court found as a conclusion of law, that the patent (in form) to the R. R. Co. was issued without authority of law and was and is void; because, the land being held and claimed as part of a valid Mexican grant from 1839 to June 6, 1871, and the line of the road of the R. R. Co. having been definitely fixed while the land was so held, it did not pass to the R. R. Co. (Rec. pp. 6–12, fols. 14–26).

The plaintiff placed on record a statement on motion for a new trial, which is made up of a detailed statement of the facts proved, and a part of the evidence constituting the proof, on which the decision of the trial court is based; but it contains nothing that even tends to show that the decision of the trial court was not fully sustained by the evidence.

Indeed, all that is shown by the statement of the case is merely corroborative of the correctness of the decision of the trial Court; and, briefly stated, it is as follows:

On behalf of plaintiff, it presents:

A. The patent (in form) to the R. R. Co., dated May 17, 1874, and the deed from the R. R. Co. to plaintiff dated

June 10, 1871, under which he claimed title to the land sued for (Rec. pp. 14–15, fols. 29–32).

B. Reference to, and evidence concerning, the making and existence of what is called the Lewis survey, which was a preliminary or initiatory survey made in May, 1854, of a part of the lands within the exterior boundaries of the Mexican grant, Las Pocitas. (Rec. pp. 23–27, fols. 49–55; and pp. 36–7, fols. 74–6; and pp. 49–50, fols. 101–3).

C. A decision (if it can be called such) by the Hon. Com. of the Gen. Land Office, dated May 3, 1873, in a case entitled St. Clair *vs.* Western Pac. R. Co., and a stipulation between attorneys, who seem to have been concerned in that case; and then, appeals by these attorneys to the Hon. Secretary of the Interior, filed in July, 1873; and mention of a decision by the Secretary. (Trans. pp. 27–41, fols. 56–85).

D. Testimony of the Receiver of the U. S. Land Office, at San Francisco, to the effect that the township lines of T. 2 S., R. 2 E., were surveyed partly in 1853, partly in 1861, and partly in 1869; and dates when other township lines were also partly run. (Rec. p. 42, fols. 86–7).

E. An opinion of the Secretary of the Interior in a case entitled, State of California *vs.* Central Pac. R. Co., dated June 26, 1879; and reference to another opinion in a case entitled, State of California *vs.* M. D. Townsend, Western Pac. R. Co., et. al. (Rec. pp. 42–5, fols. 87–93); and reference to the decision of the Secretary of the Interior, dated July 30, 1868, disapproving of the Dyer survey of 1865, of the Las Pocitas grant (Rec. p. 45, fol. 93).

F. Stipulation that the Central Pac. R. Co. of Cal., and the Western Pac. R. Co. became consolidated under the

name Central Pacific Railroad Company, on June 22, 1870, (p. 47, fol. 97); and,

G. Specifications of error assigned by the plaintiff on his motion for a new trial. (Rec. pp. 50-3, fols. 104–110).

On behalf of defendant, it presents:

A. An admission by plaintiff that defendant was not a party to any of the proceedings or cases hereinbefore mentioned, viz.: St. Clair *vs.* Western Pac. R. Co., or, State of California *vs.* Central Pac. R. Co., or, State of California *vs.* M. D. Townsend, Western Pac. R. Co., and that he does not claim any right or interest under any person who was a party thereto, (Rec. pp. 27, 41, 42, 45, fols. 56, 84, 88, 92); and objections by defendant on that ground, with others, to the introduction of said proceedings as evidence in this case. (Rec. pp. 27, 41, 44–5, fols. 56, 84–5, 91-2-3).

B. A detailed statement of facts which defendant proved and established on the trial, (Rec. pp. 15–23, fols. 33–49); and which are substantially, if not identically, the same facts found by, and set forth in the decision of the trial Court.

C. Objections by defendant to the introduction as evidence of the preliminary or initiatory survey made by Mr. Lewis, within the exterior boundaries of the Las Pocitas grant, in May, 1854. (Rec. pp. 3–6, fols. 49-54).

D. A stipulation that the land in contest is located within the boundaries of the original diseño or map of the Mexican grant, Las Pocitas, which accompanied the grant in April, 1839, and which was presented to the Land Commission by the grantees in Feby., 1852, with their petition for confirmation of the grant; and that the land is also within the Dyer survey of 1865, of the grant; and that a

portion of the land included within the final survey of the Las Pocitas grant, for which the patent issued, lies outside of the preliminary Lewis survey. (Rec. pp. 46-8, fols. 96–100).

E. That the land in contest "forms part of the tract and "lies within the boundaries designated and set forth in the "said decrees of the Board of Land Commissioners and the "United States District Court for the northern district of "California and affirmed by the United States Supreme "Court." (Rec. p. 16, fol. 35).

F. An official letter from the Com. of the Gen. Land Office to the Reg. and Rec. of the local U. S. Land Office dated, June 30, 1870, conveying instructions not to receive any application whatever from preemptors, etc., for tracts within the exterior boundaries of the Mexican grant, Las Pocitas; and an agreement by the parties hereto that on June 23, 1871, the Reg. and Rec. of the local U. S. Land Office received from the Com. of the Gen. Land Office an official letter dated, June 14, 1871, instructing them that the Secretary of the Interior had affirmed the decision of the Commissioner approving the final survey of the rancho Las Pocitas, and that the land outside of said final survey theretofore held in suspension to await the final determination in the Pocitas case were therefore relieved from such suspension, and that they should deal with them as other public lands are dealt with. (Rec. p. 46, fols. 94–5).

G. A map filed in the office of the Secretary of the Interior on Feby. 27, 1873, by the Central Pac. R. Co., showing the line of the road as completed and in operation through the Las Pocitas grant, and upon which map the Las Pocitas grant is delineated and laid down according to the

Dyer survey of 1865, and which embraces the land in controversy in this action. This map was put in evidence to show that the R. R. Co. had, as late as Feby. 27, 1873, recognized and admitted that the reservation of the Las Pocitas grant from the R. R. grant was co-extensive with the Dyer survey of 1865, which includes the land in controversy. (Rec. pp. 46–8, fols. 96–100).

Argument.

I.

The R. R. Co. acquired no right or title to the land in controversy; because it was included within, and held and claimed as a part of the Mexican grant, Las Pocitas, from A. D., 1839, *until June* 10, 1871, *during which time the line of the road of the R. R. Co. was definitely fixed, and the road completed, and put in operation.*

The Pacific R. Act of July 1, 1862, amended July 2, 1864, (12 Stat. at L., 492, Sec. 3, and 13 Stat. at L., 358), constitutes a grant *in praesenti* of "every alternate section of "*public* land, designated by odd numbers * * not sold, "*reserved*, or otherwise disposed of by the United States, "and to which a preëmption or homestead may not have "attached, at the time the line of said road is definitely "fixed."

It was this Act of Congress *itself*, and *not* the patent subsequently issued, which conveyed the title to the R. R. Co. for the lands granted. The patent is but mere *prima facie* evidence, obtained on *ex parte* application, from ministerial officers, of a *prior conveyance* or investiture of the *title* made by Congress through the act itself.

Deseret Salt Co. vs. *Tarpey*, 142 U. S. Rep., 241; and the cases there considered and cited;

Sioux City Co. vs. *Griffey*, 143 U. S. Rep., 32;
New Orleans R. Co. vs. *Parker*, 143 U. S. Rep., 42;
Jatunn vs. *Smith*, 95 Cal. R. 155;
Forrester vs. *Scott*, 92 Cal. R., 398;
Denny vs. *Dodson*, 32 Fed, R., 899.

The *title* to the land granted by the act did not at all depend on the patent; and the issuance or non-issuance of the patent did not affect the *title* or *ownership* of the lands which were either *granted*, or *excepted* from the grant, by the Act of Congress, and did not increase or diminish the title or ownership which the act alone conferred. Hence, the party holding the R. R. title to lands granted by the act, after the line of the road was definitely fixed, and the road completed, could maintain his action at law or in equity, for or concerning the lands, as well before as after the issuance of the patent.

Van Wyck vs. *Knevals*, 106 U. S. Rep., 370;
Missouri R. Co. vs. *Kansas R. Co.*, 97 U. S. Rep., 497;
Schulenberg vs. *Harriman*, 21 Wall. Rep., 58;
Wright vs. *Rosberry*, 121 U. S. Rep., 488;
Railroad Co. vs. *Baldwin*, 103 U. S. Rep., 427;
Leavenworth, etc. R. Co. vs. *U. S.*, 92 U. S. Rep, 743;
Jatunn vs. *Smith*, 95 Cal. Rep., 155, *supra.*

According to the express provisions of the act, lands which were "sold, *reserved*, or otherwise disposed of by the "United States * * at the time the line of the road is "definitely fixed," did not pass, and were *not* granted to the R. R. Co. Such lands were excepted from the grant, and were not affected by the act, and were as free from its operation as if it had never been passed. And a patent certificate for such excepted lands is *false evidence, i. e.*, pur-

porting to show that the lands therein described were granted by the act, when in fact and in law they were not.

Leavenworth etc., R. Co. vs. *U. S. supra;*
U. S. vs. *Stone*, 2 Wall, Rep., 525;
Dubuque and Pac. R. Co. vs. *Litchfield*, 23 How. Rep., 66.

The exact time at which the R. R. grant took effect was, *when the line of its road was definitely fixed.* And any land which came within the exceptions from the grant at that time, never passed to the R. R. Co. at all. They stood excluded from the grant forever.

Kansas Pac. R. Co. vs. *Dunmeyer*, 113 U. S. Rep., 629;
Newhall vs. *Sanger*, 92 U. S. Rep., 761.

A patent issued by the executive officers for lands *excepted and reserved* by the Pacific R. Act from the grant thereby made, and under which act alone the patent purports to be issued, is not only without authority of law, but is contrary to the express provisions of law. It is not merely irregular. It is a patent only in form, but it is *nothing* in law or in fact. It is *void.*

Doolan vs. *Carr*, 125 U. S. Rep., 618;
Newhall vs. *Sanger*, 92 U. S. Rep., 761;
Reichart vs. *Felps*, 6 Wall, Rep., 160;
Best vs. *Polk*, 18 Wall, Rep , 112;
Carr vs. *Quigley*, 57 Cal. Rep., 394;
McLaughlin vs. *Powell*, 50 Cal. Rep., 64;
McLaughlin vs. *Fowler*, 52 Cal. Rep., 203.

In the case at bar, the land in controversy is located within the exterior boundaries of the Mexican grant, Las Pocitas, as described in the original diseño and original map of the grant, when made in the year 1839 (Rec. p. 47,

fol. 98); and is located within the exterior boundaries of the grant as described in the decree of the U. S. Land Commissioners, made in the year, 1854; and within the exterior boundaries as described in the decree of the U. S. District Court made in the year 1859, and affirmed by the U. S. Supreme Court in 1861; and within the survey made of the grant in Sept. 1865, with a view to having a patent issued for the grant (Rec. p. 15-6, fols. 32-5); and it was held and treated as reserved land by the U. S. Land Department until June 6, 1871; and it was recognized and considered by the Central Pac. R. Co. as late as Feby. 27, 1873, as forming part of the Mexican grant (Rec. p. 46, fols. 94-6); and the line of the road of the Western Pac. R. Co. was definitely fixed, and a map of the same filed with the Secretary of the Interior on Jany. 30, 1865, under and for the purposes of the Railroad Act (Rec. p. 19, fol. 40); and the withdrawal of lands for the R. R. Co. took place on Jany. 31, 1865. (Rec. p. 19, fol. 40).

Under these facts, the land in controversy was not granted to the R. R. Co.; it was reserved to meet the demands of the Mexican grant, and expressly excepted from the operation of the Pacific R. R. Act. And the patent issued therefor in May, 1874, to the Central Pac. R. Co. by the executive officers of the Government was issued not only without authority of law, but indeed against law. It is *false evidence*, and it is *void*.

Doolan vs. *Carr*, *supra;*
Newhall vs. *Sanger*, 92 U S. Rep., 761;
Kansas R. Co. vs. *Dunmeyer*, *supra.*
Leavenworth, *etc. Co.* vs. *U. S. supra;*
Reichert vs. *Phelps*, *supra;*
Best vs. *Polk*, *supra;*

U. S. vs. *Stone*, 2 Wall. Rep., 525;
Carr vs. *Quigley*, 57 Cal. Rep., 394;
McLaughlin vs. *Head*, 63 Cal. Rep., 208.

II.

The objections made by plaintiff to the proof by defendant of the facts establishing that plaintiff has no title to the land sued for, and that his prima facie evidence of title, the patent, was issued without authority of law and is void, were properly overruled.

The claim on behalf of defendant is, that the patent used as evidence by plaintiff is not merely voidable, but, *that it is void.* The distinction between these terms is well known. When a patent is merely voidable, it means that there was authority of law for its issuance, and that the *title* became vested *thereby* in the patentee, although it was erroneously or wrongfully issued, and is liable to be avoided; but, nevertheless, it is the means by which the title vested in the patentee; and, in an action at law the title thus vested will prevail. But, where the patent is issued without authority of law, or for land that had never been within the control of the officer, or for land that had been reserved or withdrawn from the control of the officer, who issued the patent, at the time of its issue, such a patent is issued, without authority of law and is void. Furthermore, there are two species of patents, viz.: one by which the *title* is *thereby* conveyed; and, the other by which no title is conveyed, and which serves only as *prima facie* evidence that the title had become vested previously by act of the legislative department of the Government. Patents issued under the Pacific R. Acts are of the latter species, as we have already shown, and when issued for lands which were not

not granted, such patents are but *false evidence*, and their nullity and falsity can be shown wherever or whenever they are presented and relied on as evidence of title.

St. Louis Co. vs. *Kemp.*, 104 U. S. Rep., 636;
Wright vs. *Rosberry*, 121 U. S. Rep., 499.

We submit that this subject has received decisive attention from this Court in a case in which the subject was directly involved in,

Doolan vs. *Carr, supra.*

And even long before the decision in that case, it was said: "The complaint alleges property and right of possession in "the plaintiff; the answer traverses directly these allega- "tions; and under the issues thus formed, *any evidence* was "admissible on the part of defendant which went to show "that the plaintiff had neither property nor right of pos- "session."

Schulenberg vs. *Harriman*, 21 Wall. Rep. 58–9, *supra.*

"It has always been held that an absolute want of power "to issue a patent could be shown in a court of law to "defeat a title set up under it."

Sherman vs. *Buick*, 93 U. S. Rep., 216; citing;
Stoddard vs. *Chambers*, 2 How. U. S. Rep., 317;
Easton vs. *Salsbury*, 21 *id.*, 426;
Reichart vs. *Felps*, 6 *Wall. Rep.*, 160.

It is over sixty-six years ago since it was said by this Court, after considering the subject at length:

"We may, therefore, assume as the settled doctrine of "this Court, that if a patent is absolutely void upon its "face, *or the issuing thereof was without authority, or was "prohibited by statute,* or the State had no title, it may be

" impeached collaterally in a Court of law, in an action of " ejectment."

Patterson vs. *Winn*, 11 *Wheat. Rep.*, 384;

citing,

Polk's Lessee vs. *Wendell*, 9 Cranch Rep., 87 (1815);

Same case, 5 Wheat Rep., 293 (1820);

Jackson vs. *Lawton*, 10 Johns. Rep., 23 (1813).

The same rule prevails in the State where this case was tried, and has always prevailed there.

Carr vs. *Quigley*, 57 Cal. Rep., 394, *supra*; and many other cases.

From the nature of things, this rule seems to recommend itself instantaneously. It is, in short, expressed thus:

If plaintiff shall introduce false evidence to show title for the land in himself, whether such evidence be in the form of a patent purporting to be issued under the Pacific R. Act, or in any other form, the defendant has the right, and it is competent for him, to show that plaintiff's evidence is false, and that he has no title. The proof is not made by defendant for the purpose of attacking or even avoiding a patent. It is made for the purpose of proving that there is no patent (or title) to be attacked or avoided.

Furthermore, the evidence adduced by defendant in proof of the falsity and nullity of the patent in the case at bar, is documentary, from the public offices of the Government, begotten through adjudication and contest, &c., and is of a higher and more reliable character than this patent, obtained on a mere *ex-parte* application.

Doolan vs. *Carr*, *supra*, p.

" A patent is but the result of a mere *ex-parte* application, " and it is not entitled to as much importance as evidence

" of title as is frequently supposed. In nine cases out of " ten, perhaps in a much larger percentage, the proceed- " ings are wholly *ex-parte*. In the absence of any contesting " claimant for a right of purchase or to secure the land, the " party applying has it all his own way," &c.

U. S. vs. *Minor*, 114 U. S. Rep., 240.

Plaintiff alleged himself to be the owner and entitled of the land sued for, and defendant denied that allegation. On trial, defendant proved that plaintiff is not the owner or entitled of the land; and the contention on plaintiff's part is that, true, I have no title but you, defendant, must not be permitted to show that fact, and I must be given possession of land with rents, damages, &c., from you, without having any title thereto. If any such rule as that should prevail, it would be a travesty of justice under the name of law.

III.

The rules which we have laid d wn as applicable to this case are rules of long standing, well sustained by precedent, and repeatedly announced after very full deliberation.

The opinion of the Supreme Court of California in this case is very brief, and there are but three precedents cited therein (Rec. p. 57, fol. 122).

The dissenting opinion of Mr. Justice PATTERSON of that Court seems to proceed on the notion that this Court has taken a new departure, or has changed the rule of its previous decisions, in *U. S.* vs. *McLaughlin*, 127 U. S. Rep., 428; and on that ground the learned Justice predicts that upon the record here, this Court will hold that the Las Pocitas is a float, and that " the railroad company, by the " acts of 1862 and 18 4, had a valid grant to every odd

"section of land within twenty miles on each side of the "road, and within the exterior bounds of the Las Pocitas "grant not embraced within the two leagues" finally located and patented to Livermore's heirs; and that the true character of the grant was not presented to this Court in *Doolan* vs. *Carr*, 125 U. S. Rep., 618 *supra* (Rec. pp. 59–60, fol. 122).

The idea on which the learned dissenting Justice must necessarily base his prediction in this behalf is, 1st: That a radical departure from the rule laid down in former decisions has occurred in the case just mentioned (*U. S.* vs. *McLaughlin*); and 2d: That the Court has virtually overruled *Newhall* vs. *Sanger*, (95 U. S. Rep.), *Leavenworth* vs. *R. R. Co.*, (92 U. S. Rep.), *Carr* vs. *Doolan*, (125 U. S. Rep.), and many other cases in this Court, and also a long line of cases decided by the Supreme Court of California, viz: *McLaughlin* vs. *Powell*, (50 Cal. Rep.), *McLaughlin* vs. *Fowler*, (52 Cal. Rep.) *Carr* vs. *Quigley*, (57 Cal. Rep.), and many other cases.

Apart from the fact that no such disastrous overthrow of judicial precedents has taken place, it would be most unfortunate to have reason to apprehend any deviation in the consistency of the rulings and decisions of this Court. And we most emphatically claim that there is no inconsistency whatever in that behalf, and that the learned dissenting Justice proceeded on mistaken and miscalculated grounds.

In *U. S.* vs. *McLaughlin* the lower Court found as facts that the Moquelamos grant was finally rejected on Feby. 13, 1865, and that the line of the road of the Western Pac. R. Co. was not definitely fixed until after that time; and, that finding was not questioned by this Court. This was enough for a decision of the case in favor of the R. R. Co. All the

rest said in the decision may be fairly considered *obiter dicta*. But, as this Moquelamos claim was not a grant at all, and as it never underwent any process towards its location, and was never surveyed, or the like, the Court proceeded to consider the location of the eastern boundary, that being mentioned in the pretended grant as "on the east upon the adjacent ridge of mountains;" and the Court concluded that this must be at what was called in the case, the "Jack Tone Road;" and that, with this as the east boundary, and the other three boundaries (north, south and west) which were considered sufficiently certain, there would be more than double enough land to satisfy the claim of eleven leagues, even if the grant were valid. It is then said that there are three kinds of grants, viz.: 1st, grants by specific boundaries, where the grantee is entitled to the entire tract within the given boundaries; 2d, grants of a certain quantity within outside boundaries embracing more than the quantity granted; and 3rd, grants of a certain place or rancho. It is said the second kind may be called a float, and that the Moquelamos was of that kind.

As we take it, the only object the learned Justice, who prepared the decision, could have in thus considering the boundaries of this Moquelamos claim was, to ascertain how much was reserved, within the provisions of the R. R. Act, so as to give it the effect of a reservation, assuming that the pretended grant was not finally rejected when the line of the road was definitely fixed. The classification of grants is a correct one. The first and third kinds are grants of *all* lands within the given boundaries or constituting the place or rancho named, and not merely reserved, but are granted lands, *i. e.*, all private property. But it is only where there is a given quantity, such as two, four or any other number

of leagues granted within given boundaries containing a larger quantity, that the reservation of the whole is made until the lesser and granted quantity is finally located and set off by survey to the grantee. It is true, as said by the Court, that such a grant is "to be located by the consent of "the Government before it can attach to any specific "land." But, whether such a grant be called a float or a sobrante, or by any other name pleasing to the person who chooses and applies it, the grant attaches *generally* to the larger designated tract, within which it is to be located, until by final location and survey it becomes attached to the necessary specific quantity; and then the remainder, or sobrante, becomes released from reservation. And if this reservation pertains at the time the line of the railroad is definitely fixed, the R.R. Co. obtains no claim or title to the land. This has been the uniform rule laid down by this Court, as will be seen by many of the cases herein cited.

The Moquelamos claim was not a grant at all or of any kind, but was what the Court called "a wretched fraud;" yet, the mere claim that it was a grant was sufficient to have it declared reserved from the R. R. grant to the extent of its boundaries, on the assumption that it was not finally rejected at the time the line of the road was definitely fixed.

Newhall vs. *Sanger, supra;* and also,
U. S. vs. *McLaughlin, supra.*

The Las Pocitas grant was a valid one, and its exterior boundaries well known and certain, and the land sued for here is located within those boundaries, without dispute or controversy. The grantees contended, to the last opportunity, that the Las Pocitas was a grant of the entire tract described by the boundaries mentioned, and not of any less amount, *i. e.*, belonged to the first kind of grants above

boundaries of the grant, as confirmed by the Board of Land Commissioners before it was made, and as confirmed by the Courts after it was made. The land in controversy is within the boundaries of the grant, as originally made in 1839, and as subsequently confirmed by the Board of Land Commissioners and the Courts, but not within this initiatory survey.

This survey was not mentioned or heard of from the time it was made in 1854 until about Nov., 1872, which was *after* the patent had been issued to Livermore's heirs for the final survey of their grant. It was then dug up for some purpose not disclosed by the record, and it has been referred to, and sometimes used, from time to time afterwards by parties interested, one way at one time and another way at another time, sometimes by consent and perhaps sometimes by collusion with others, to suit their respective purposes or designs. Appropriate to this observation it will be seen that the cases (*St. Clair* vs. *Western Pac. R. Co.*, and two others) presented to the officers of the Land Department proceeded on the theory that this "Lewis survey was a cor-"rect delineation of the exterior boundaries of the Las Pocitas grant" (Rec. p. 43, fols. 89-90). But, in the words of the attorney for plaintiff in the case at bar, "The "defendant, John Quigley, was not a party to the proceed-"ings, and does not claim any right or interest under any "one who was a party to the proceedings" (Rec. p. 42, fol. 88); and in *his* case it turns out that this survey is *not* a correct delineation of the exterior boundaries of the Las Pocitas grant (Rec. p. 16, fol. 35). And it appears further that the final survey and patent to Livermore's heirs contains land not included in the Lewis survey (Rec. p. 48, fol. 100). In short, it was not regarded, referred to or considered at all until the Las Pocitas grant was patented and

closed forever; and, never by any one connected with the Las Pocitas grant.

In addition to all this we beg leave to say that the reasoning and context of the decision of the Com. of the Genl. Land Office in the case mentioned (*St. Clair* vs. *West. Pac. R. Co*) is not sound or well reasoned or calculated to pass as a standard precedent. But we are more inclined to say that the Hon. Commissioner was merely imposed upon and misled.

As against this defendant, however, we submit that this part of the record has no bearing on the merits of this case, and it is inadmissable and immaterial.

We respectfully submit that the judgment of the State Supreme Court and should be affirmed.

MICH. MULLANY,
Counsel for defendant in error.

149-152

Office Supreme Court U. S.
FILED.
APR 24 1893
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

W. B. CARR, PLAINTIFF IN ERROR,

v.

JOHN QUIGLEY.

No. 259.

In Error to the Supreme Court of the State of California.

BRIEF FOR PLAINTIFF IN ERROR.

F. H. WATERMAN,
Attorney for Plaintiff in Error.

A. T. BRITTON,
A. B. BROWNE,
of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

W. B. CARR, PLAINTIFF IN ERROR, v. JOHN QUIGLEY.	No. 259.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

I.

This action is in ejectment coming from the Supreme Court of California, and was commenced on the 29th day of December, 1877, in the District Court of Alameda County, State of California, by the plaintiff in error, to recover the possession of the northwest quarter of section nineteen, situated in township two south, range two east, Mount Diablo base and meridian, of the United States land surveys, in the county and State aforesaid.

The land is a portion of an odd-numbered section granted to the Central Pacific Railroad Company of California by the Act of Congress of July 1, 1862, as amended

by the Act of July 2, 1864, and by force of the Act of March 3, 1865, and of the consolidation of the Central Pacific Railroad of California and the Western Pacific Railroad Company, under the name of the Central Pacific Railroad Company, in June, 1870, inuring to said Central Pacific Railroad Company, to whom a United States patent therefor was issued on the 17th day of May, A. D. 1874 (Record 14, 15).

The plaintiff takes title from the Central Pacific Railroad Company.

The complaint alleges ownership in fee simple, prior possession, subsequent ouster, and present unlawful withholding by defendant.

Judgment is prayed, against the defendant and in favor of plaintiff, for damages, restitution of the premises, and costs.

The amended answer of defendant denies all the allegations of the complaint.

And, for a second defence, the answer alleges that the land in contest at the date of said Congressional Act of July 1, 1862, and at the date of the patent was not land subject to disposal by Congress, but was land reserved to answer the calls for land of a certain Mexican grant called Las Pocitas, made by the Mexican Government to Jose Noriega and Robert Livermore on the 10th day of April, A. D. 1839, and that, by reason of such alleged reservation, the patent of May, 1874, to said company was without authority of law, and void, and that since the — day of October, 1877, defendant has been in rightful possession of said land as a pre-emptor under the laws of the United States.

And, for a third defence, the answer alleges that the land sued for was not sold by the grantee company within three years from and after the completion of its road, as

provided in section 3 of the Act of July 1, 1862 (R. 2, 3, 4, 5).

A demurrer to this third defence was sustained by the trial court (R. 5, 6), and was acquiesced in by the defendant; therefore it does not appear in the agreed statement on motion for a new trial in that court shown by the transcript, and so needs no further mention here.

It was ageeed by both parties that the annual value of the rents and profits of the land in contest is fifty dollars (R. 15).

II.

At the first trial had in the District Court of Alameda County, in March, 1879, the plaintiff put in evidence the U. S. patent of the land to the Central Pacific Railroad Company and the conveyance of the same by said company to the plaintiff; thereupon the defendant offered to prove that the land in contest was within the exterior boundaries of said Mexican grant, and was, therefore, reserved from the Congressional grant to the Railroad Company of 1862–64, so that there was no power in the officers of the Government to issue a patent for it, and that the patent put in evidence at the trial was, therefore, void, as alleged in the answer. The plaintiff objected to the offered proof, for the reason that the land was not subject to pre-emption when the defendant entered thereon, and that the United States patent, of a date previous to defendant's entry, was conclusive in an action of ejectment and could not be attacked collaterally. The objection was sustained. The defendant excepted to the ruling, and rested, and the trial closed. Judgment was rendered for plaintiff.

Thereupon defendant appealed to the Supreme Court

of California, by whom, on the — day of January, 1881, the judgment and order of the Court below was reversed, and the cause remanded for a new trial, because of error in sustaining the objection of plaintiff and excluding the testimony offered by defendant at the trial (57 Cal. 394).

On the 11th day of April, 1883, the cause again came on for trial in the Superior Court of Alameda county, the successor to the District Court of that county under the new Constitution of Calfornia, in operation on the first day of January, 1880. At that trial all the evidence offered by defendant, including that excluded at the previous trial, was admitted. There was also a large amount of new testimony introduced relative to the question of reservation of the land in contest, rejected at the first trial.

This second trial resulted in a judgment for defendant, and was adverse to the judgment had at the first trial, the trial Court deciding that the land in controversy "was "held and claimed as a part, and was reserved for "satisfaction of said Mexican grant Las Pocitas" (R. 12). Plaintiff moved for a new trial upon grounds of error, and upon a statement of the case, showing the evidence presented at that trial, the motion was denied.

Thereupon the plaintiff appealed from the order of denial to the Supreme Court of California, which appeal brought before that Court for the first time all the testimony deemed necessary by both parties to the elucidation of the matter of title, including the new testimony taken at the second trial, which had been offered by the defendant and wrongfully excluded at the first trial, and which especially related to the question of reservation of the land in contest from the grant to the Railroad Company. That testimony appears in the transcript, shown in the record here.

III.

The opinion of the Supreme Court of California reads as follows:

"We regard the contention of appellant Carr, in this "case, as settled by the decision of the Supreme Court of "the United States in Doolan *v.* Carr (125 U. S. 618), "and by the decisions of this Court made prior to the "judgment in Doolan *v.* Carr, viz., Carr *v.* Quigley (57 "Cal. 394), and McLauglin *v.* Heid (63 Cal. 208).

"The same points were presented in Doolan *v.* Carr "that were presented in this case, and with reference to "the same Mexican grant Las Pocitas. The only differ- "ence is that in Doolan *v.* Carr the points arose and "were presented on an offer of testimony, and here they "arose on the proof of the facts which Doolan offered to "prove in his suit against Carr."

Chief Justice Beatty concurred solely upon the ground of the law of the case made by the previous decision on the first appeal, and the opinion of the majority of the Court seems to assign substantially the same grounds (R. 57).

Mr. Justice Paterson, in his dissenting opinion (R. 57, 58, 59, 60), evidently regards the majority opinion as having been made upon the law of the case, omitting, as it does, any reference even to *United States* v. *McLaughlin* (127 U. S. 428).

It may be, however, that the Supreme Court of California intended that it should be understood that they had considered the testimony in the Record relative to the matter of reservation, and that such consideration is evinced by the language of the Court as to the difference between Carr *v.* Doolan and the case at bar above given, and that the testimony proved a reservation of the land in

contest from the operation of the Congressional grant of 1862, notwithstanding the recent definition and limitation of reservation in such case made by this Court in United States *v.* McLaughlin.

We shall treat the opinion and decision in our discussion here in both aspects; as made upon the grounds of the law of the case, and of reservation also.

The question of reservation was the sole matter considered by the Court in its first opinion; is the only defence of importance made in the answer and is the question presented by this record for decision.

The amended answer, also as a defence, avers that on the —— day of October, 1877 (fifteen years after the grant to the company, and more than three years after the date of the patent, and after the completion of the road in 1869), the defendant entered upon the land as a pre-emptor upon public land, subject to pre-emption, and that thereafter, on or about the —— day of November, 1877, while claiming to be so in possession, he presented his declaratory statement of his "intention to pre-empt "said lands * * * to the Register and Receiver of "the U. S. land office at San Francisco and offered to "file the same, and at the same time tendered to said "officers the fee prescribed by law therefor. That said "officers refused to receive and file said statement for the "reason that said lands had theretofore been patented to "the Western Pacific Railroad Company as aforesaid" (R. 4, 5).

The Record does not show that an appeal from that refusal and decision of the Register and Receiver was ever taken to the Commissioner of the General Land Office. The defendant seems to have acquiesced and abandoned his claim to pre-emption, and then, as now, to rely solely upon naked possession for title, as against

not only the plaintiff, but the United States also. No privity with the source of title is shown, nor was any possible; a patent for the land in question having been already issued, the Land Department had no longer power in the matter.

ASSIGNMENT OF ERRORS.

I.

"The Court erred in holding that the land in controversy in this action was reserved and excepted from the grant of lands made to the Western Pacific Railroad Company by Act of Congress known as the Pacific Railroad Acts, by reason of said land being located within the exterior boundaries of the Mexican grant 'Las Pocitas,' and that the patent issued by the United States to the plaintiff's grantor, the Central Pacific Railroad Company, was therefore issued without authority of law, and was and is void because it appears from the record in this case that said Mexican grant was a grant of quantity only, namely,' two square leagues, a little more or less,' to be segregated from the ten or more square leagues of lands embraced within said exterior boundaries, said quantity of two leagues granted and confirmed to the Mexican grantees being a mere float until the same should be segregated and located by authority of the United States, which was accordingly done, and such segregation and location became final on the 6th day of June, 1871. Therefore the Court erred in holding that said land was reserved from said grant to said company, and that said patent and deed are void."

"2. The Court erred in holding that this case is like that of Doolan *v.* Carr, because in that case the record stated that said Mexican grant 'Las Pocitas' was a grant of all the land within the boundaries named, whereas in this case the record shows that said grant was of about one-fifth only of the quantity of land within said boundaries, and therefore a float" (R. 60, 61).

ARGUMENT.

I.

The specifications of error above given raise two points for consideration, in addition to the matter of neglect by defendant to appeal from the action of the local land office at San Francisco, disclosed by the record, and the matter of the "law of the case," upon which the Supreme Court of California seem to have also affirmed the judgment of the trial Court at the second trial.

The two points referred to are as follows, viz:

FIRST. Was the grant of land made by the Mexican Government, in 1839, to Noriega and Livermore, named Las Pocitas, a "float," as that term is defined in the recent case of *The United States* v. *McLaughlin* (127 U. S. 428), viz: "Grants of a certain quantity to be located "within a larger tract or territory, whether of limited ex- "tent marked by certain bounds, or anywhere in the "State, as in the case of Iturbide?"

SECOND. If the grant was a "float," was the land in contest reserved from the power of disposal by Congress for the reason that it was a part of the grant or float, or was it outside of it, and so not reserved?

It is evident that the important question to be determined here is that of reservation.

II.

The grant of land by the Mexican Government, called Las Pocitas, was for two leagues, if that quantity be contained within certain boundaries mentioned in the grant, which boundaries are given in the decree of final confirmation by the United States Supreme Court, as follows,

viz: "The land of which confirmation is hereby made is "known as Las Pocitas, and is bounded and described as "follows, to wit: On the north by the Lomas de las "Cuevas; on the east by the Sierra de Buenos Ayres; "on the south by the dividing line of the establishment "of San Jose, and on the west by the rancho of Don "Jose Dolores Pacheco, containing in all two square "leagues" (R. 22). The same description appears in the decree of confirmation by the Board of Land Commissioners, and of the District Court, and in the grant itself (R. 15, 16, 17). This description is also repeated in the decision of Willis Drummond, Commissioner, in the case of Arthur St. Clair *v.* The Western Pacific Railroad Company, wherein a full and interesting history of this Mexican grant, Las Pocitas, is given (R. 28, 35, inc.).

That this grant was of a certain quantity, to be located within a larger tract or territory—in short, a "float"—will not be denied. The final survey was of two leagues only, which quantity was patented to the heirs of Livermore in satisfaction of the grant (R. 17).

III.

The larger tract, within which the two leagues of land granted was found, is shown by the Lewis survey of 1854, containing over four and one-half leagues, or $20{,}846\frac{31}{100}$ acres, and also by the Dyer survey of 1865, containing nearly ten leagues, or $43{,}011\frac{31}{100}$ acres, as appears on the maps of survey themselves, covered by the stipulation (R. 47), also (R. 32, 33); the Mexican or Spanish league being $4{,}438\frac{68}{100}$ acres.

It will be noticed by the dates that this case was tried in the courts of Alameda County long before the decision of the Supreme Court in the recent case of *The United*

States v. *McLaughlin* (127 U. S. 428). The testimony at both trials in the District Court in 1878, and also in the Superior Court in 1883, appearing in the Record here, was adduced to show that the land in contest was not reserved from disposal by Congress at the date of the Act, July 1, 1862, nor at the date of the patent therefor, on May 17, 1874, for the reason that it was not situated within the limits of the so-called Lewis survey made in 1854, at the instance of Livermore, then the sole owner and claimant, in his presence and in the presence of the adjoining land-owners, and to his and their satisfaction, immediately after confirmation by the Board of Land Commissioners, but before the final affirmation by the Supreme Court, at the December term, 1860, and while the grant was yet *sub judice*, said survey having been held by Secretary Delano on appeal from the Commissioner of the General Land Office in the St. Clair case to mark the outboundaries of the grant Las Pocitas. (R. 21, 50, inc.)

The contentions about the boundaries and quantity of said Rancho Las Pocitas, so far as the record discloses, continued until August, 1872, when a patent for the two leagues of land granted was issued (R. 8, 17).

It was thought at the dates of the trials mentioned that, under the decision in *Newhall* v. *Sanger* (92 U. S. 761), all land claimed under a Mexican grant, however wide the claim or supposititious the grant, was reserved by force of the claim alone, and the testimony in the record is mainly to that point, viz., that the land in contest, not being included within the lines of the initiatory or preliminary Lewis survey of 1854, made before final decree and confirmation, was therefore not reserved from operation of the Act of 1862 (R. 23–44 inc.).

It is not denied that later, in 1865, after final confirma-

tion by the Supreme Court, a survey was made under decree and mandate by the U. S. Surveyor General for California, by his deputy, E. S. Dyer, known as the Dyer survey of 1865, before mentioned, which did include the land in suit, as being a portion of the land claimed and granted and covered by the decree (R. 3, 7, 8, 16, 17, 19, 20).

This so-called Dyer survey was rejected for excessiveness, and a final survey made of the two leagues granted (R. 3, 4, 8, 17).

Therefore it is that the testimony showing that the Las Pocitas grant was a grant of a certain quantity to be located within a larger tract or territory—in short, "a float"—appears by the record to be incidental to the other testimony then deemed of controlling importance; and, therefore, also it is that the testimony on this point, while it is ample and sufficient, is somewhat scattered in the record (R. 6, 7, 16, 20, 21, 22, 29, 36).

IV.

The question whether the land in contest was reserved from disposal by the Government, at the dates of the grant and patent mentioned, even though claimed by the Dyer survey of 1865, does not seem to admit of discussion at the present time.

The recent decision in *United States* v. *McLaughlin* (127 U. S. 428), above cited, holds that land outside of the land granted as a float is not reserved from disposal by Congress, if sufficient land lying together remains to satisfy the grant.

The stipulation (R. 47) shows that the land sued for is not only outside of the final survey of the land granted, but is also outside of the lines of the initiatory or prelim-

inary Lewis survey, which contains, in a compact body lying together, more than double the quantity of land granted, and so more than satisfied the requirements of that decision.

The final survey of the Las Pocitas, made in March, 1869 (R. 3–17), on which a patent for the land was issued, shows that the two leagues of land granted were inside the boundaries of the Lewis survey, excepting only a small fraction of an acre, certified to us by the U. S. Surveyor-General for California, but not shown in the record, to be $\frac{43}{100}$ of an acre, and which overruns the boundary lines of that survey at one point, and was evidently occasioned by the closing of the final survey upon, and including a forty-acre subdivision of, a quarter section (N. E. ¼ of N. W. ¼, sec. 6, tp. 3 S., R. 3 E.).

This will sufficiently appear by a glance at the certified maps of that survey exhibited here, and at the presentation of the case before the Courts of California, and covered by the stipulation (R. 48–49).

We concede that the fraction of an acre mentioned may not have been properly included in the final survey.

V.

Now, with regard to the decision of the Supreme Court of California in this case, appearing in the transcript, we may be allowed to say that we think it is not only wrong, but in a large degree incomprehensible. How this case was, in the words of that Court, "settled by the decision "of the Supreme Court of the United States in *Doolan* "v. *Carr* (125 U. S. 618), and by the decisions of this "Court [the Supreme Court of California] made prior to "the judgment in *Doolan* v. *Carr*, viz., *Carr* v. *Quigley* "(57 Cal. 394) and *McLaughlin* v. *Head* (63 Cal. 208),"

we are unable to understand; and the special concurrence of Chief Justice Beatty on the sole ground of the "law "of the case," established "by virtue of the decision on "the former appeal," only adds to our inability.

Referring to the citation by the Court of the *Doolan* v. *Carr* case as an authority for their decision, we call attention to our second specification in the assignment of errors, viz., that "the Court erred in holding that this "case is like that of *Doolan* v. *Carr*, because in that case "the record stated that said Mexican grant, Las Pocitas, "was a grant of" "all the land" within the boundaries named, whereas in this case the record shows that said grant was of about one-fifth only of the quantity of land within said boundaries, and therefore "a float."

The record in *Doolan* v. *Carr* did not show the grant Las Pocitas to be a grant "of a certain quantity, 'a float,' to be located within a larger tract or territory," but the record here does show it to be a definite grant of two leagues, "a float," to be located within a larger tract, which has been variously estimated and surveyed, to contain from a little more than four and one-half leagues to something less than ten leagues, as before stated.

The respective records of the Doolan case and this case at bar hold the same relation to each other as the case of *Newhall* v. *Sanger* (92 U. S. 761) holds to *The United States* v. *McLaughlin* (127 U. S. 428), and the language of this Court in the latter case relative to *Newhall* v. *Sanger* is directly applicable to the *Doolan* case. Neither the record in the *Newhall* case nor in the *Doolan* case showed the grant to be of a certain quantity, to be located within a larger tract or territory, but the records in both the *McLaughlin* case and *this* case do show just such grants. Hence we say that the reference by the Supreme Court of California to the *Doolan* case as authority for their decision in this case was inapposite and inapplicable.

The character of the grant Las Pocitas, "a float," does not seem to have attracted the attention of the majority of the Court, so far at least as their opinion discloses; it was evidently overlooked; nor does their opinion make mention even of *United States* v. *McLaughlin*, where the doctrine of reservation in such case is clearly laid down; but in the dissenting opinion of Judge Paterson that case is regarded as determining the contention adversely to the majority opinion.

The law of the case established by the Supreme Court of California at the first appearance of this case in that Court, *Carr* v. *Quigley* (57 Cal. 395), referred to in its opinion, must be found in the following language, viz:

"Defendant offered to prove that the lands in contro-
" versy were, at the time when the lands along the line of
" the road were withdrawn from pre-emption, private entry,
" and sale, within the limits of a Mexican grant, then *sub*
" *judice*, and therefore within a 'Government reservation,'
" as that expression is used in the Act of Congress of 1864
" (13 Stats., 358). We think the Court below erred in sus-
" taining the objection to this proof. If the land was
" within a reservation, it did not pass by the patent to the
" Railroad Company. * * * The validity of a patent
" purporting to grant lands which the officers of the Gov-
" ernment have no authority, under any circumstances, to
" convey, may be controverted in any action, directly or
" collaterally. The patent is void and a defendant in an
" action of ejectment may prove the facts showing its in-
" validity. Judgment and order reversed, and cause re-
" manded for a new trial."

We respectfully submit that the "law of the case," thus declared, was a rule of evidence under which the case ought to have been tried at the first trial, and which it was obligatory upon the Court below to enforce and apply at the new trial.

In *Doolan* v. *Carr*, cited by the Supreme Court of California, there was substantially the same error as in this case—occurring at the first trial in the United States Circuit Court—and the same law of the case, or rule of evidence, was declared by this Court in that case, on appeal (125 U. S. 618), as in *Carr* v. *Quigley* (57 Cal. 395) by the Supreme Court of California.

This Court sent the case (*Doolan* v. *Carr*) back to the Court below for the same reason as actuated the Supreme Court of California in sending back for new trial this case (*Carr* v. *Quigley*); both Courts established the same rules of evidence or law of the case, viz., testimony is admissible when it is offered to prove that there was no power in the Government, or its officers, to issue a patent, for the reason that the land was not patentable, being reserved or otherwise disposed of, and that in such case a patent may be attacked collaterally in an action of ejectment.

The decision in *McLaughlin* v. *Heid* (63 Cal. 208), cited by the Supreme Court of California, was made subsequently on the authority of the previous decision in this case, *Carr* v. *Quigley*, and so adds nothing. We ask, however, consideration of the dissenting opinion of Justices Ross and McKee in that case.

VI.

As has already been set forth in the statement, a new trial was had in this case as directed, whereat was admitted all the testimony offered, including that relative to the question of reservation rejected at the previous trial, because it was then thought by the trial Court that a patent, regular and fair on its face, could not be attacked collaterally in an action of ejectment; but when the record of this new trial, so had, was presented to the Supreme Court

of California, we were, in effect, told that it could not be considered; that the law of the case made at the previous presentation had already settled the matter. How this can be so we fail to understand. We respectfully submit that the facts of the record present a case as a kind of judicial infanticide—the Court suppressed the child of its own begetting.

How obedience, at the second trial of this case, to the rule of evidence made obligatory by the Supreme Court of California should work to exclude the testimony taken at that trial from consideration, by reason of the law of the case, or rule of evidence established at the first presentation, we are not able to understand.

We may be allowed to ask why the case was sent back for a new trial, if it was not that a new judgment might be had, based upon a full presentation of all the facts bearing upon the points of contention shown by the pleadings, including, of course, the facts wrongfully excluded at the first trial, relating to the alleged reservation of the land from the Congressional grant and patent.

We think that the so-called law of the case has no application to this case; certainly not such as is given by the Supreme Court of California.

The doctrine of the law of the case as heretofore declared by the Supreme Court of California in numerous cases, commencing with *Dewey* v. *Gray* (2 Cal. 374), and ending with the recent cases *Castagnino* v. *Balletta* (82 Cal. 250), In re *Cook* (83 Cal. 415), and *Foss* v. *Hinkell* (91 Cal. 194), has been clear and uniform, and in accord with the decisions in courts of other States and in this Court.

In *Davidson* v. *Dallas* (15 Cal. 83) the Court said:

"In case of affirmation there is no question of the "finality of the judgment. Why in the case of reversal?

" It is true the case is remanded. But how? To be retried " in pursuance to the principles of law declared in the " opinion. The directions of the opinion became a por- " tion of the judgment. The opinion in this case remands " the case for further proceedings, and those proceedings " are to be in pursuance of the principles of the opinion. " This is in effect, if not directly, a mandate to the Court " below to follow the directions of the opinion of this " Court on the new trial; to administer the law as laid down " in the opinion."

Davidson v. *Dallas* is a leading case in California, and has been repeatedly upheld and referred to in subsequent decisions by the same Court, and its applicability to the case at bar is evident.

We find the same doctrine held in *Wells on Res Adjudicata and Stare Decisis*, sec. 619, viz: " The first decision, " whether right or wrong, has become the law of the case, " *Polack* v. *McGrath* (38 Cal. 668). This rule only applies, " however, where the facts remain the same upon a second " trial or upon a second appeal. If the facts change, the " former decision is no longer the law of the case. * * * " For it is clear that a party on a retrial *de novo* may in- " troduce new evidence and establish an entirely new state " of facts, to conform to which is no violation of principle " in a Court, even if it thereby does set aside its former " decision as inapplicable, and adopt a new one as suited " to the new phase of the controversy."

In *Gee's Administrator* v. *Williamson* (27 Amer. Decisions, 634), note " *Law of the Case*," the same doctrine is held. Numerous California cases are there cited, also *Washington B. Co.* v. *Stewart* (3 How. 425); *Stacey* v. *R. R. Co.* (32 Vt. 532); *Rector* v. *Deanly* (14 Ark. 307); *Dodge* v. *Gaylord* (53 Ind. 365), and cases there cited.

Indeed, all authorities concur in holding that a ruling or decision by a Supreme Court on appeal becomes the

law of the case on all subsequent proceedings when the facts shown by the later record are substantially the same as the first, but not otherwise, and that the law of the case established on the first appeal becomes obligatory upon the Court below in conducting a new trial.

The decision of the Supreme Court of California, made at the January term, 1881, on the first appearance of this case in that Court, reversed the judgment of the trial Court below, and remanded the cause for a new trial, to be had in accord with the law of the case or rule of evidence laid down in their opinion.

The case *Table M. T. Co.* v. *Stranahan* (20 Cal. 198, and 21 Cal. 548) is, in its essential features, on all fours with this case at bar. It arose on an appeal from the neglect or refusal of the trial Court below to enforce at the new trial a rule of evidence established by the Supreme Court of California on a previous appeal, which thereby, as the law of the case, became obligatory upon the Court below. The cause was a second time remanded, the rule of evidence prescribed not having been followed by the trial Court. But in this case at bar it was followed, and all the testimony offered, including that wrongfully excluded at the first trial, was admitted.

The doctrine and practice of courts as to the "law of "the case" has at times received severe criticism, as being harsh, unjust, and even un-Christian. However that may be, it will not be denied that it is limited to cases where the records of the two trials show substantial sameness of the facts.

In *Wixson* v. *Devine* (80 Cal. 385) the Court said: "The doctrine had nothing to commend it to the favor of "the Court, and that its application would not be ex- "tended beyond the cases in which it had been held to "apply."

Surely it will not be denied that the testimony at the new trial shown by the record here was mostly new, and substantially different from that at the first trial. The entire mass of testimony relative to reservation was new, and was for the first time before the Court. It was also the first time that the defendant was allowed to make his attack on the patent title of the plaintiff, his offer to do so at the previous trial having been rejected.

We have before us a list of more than twenty additional cases, from the Reports of the Supreme Court of California, unnecessary to be cited here wherein this view of the law of the case is upheld; also *Washington Briage Co.* v. *Stewart* (3 How., 413); *Himeley* v. *Rose* (5 Cranch, 313); *Santa Maria* (10 Wheat. 442); *Ex parte Sibbald* (12 Pet. 448); *Hassack's Executors* (25 Wend. 313); *Steiner* v. *Steiner* (3 Ohio, 18–19); *Stacey* v. *R.R. Co.*, (32 Vt. 532); *Booth* v. *Commonwealth* (7 Metcalf); *Gaylord* v. *Dodge* (31 Ind. 41); and *Dodge* v. *Gaylord* (53 Ind. 365.) *Dodge* v. *Gaylord* and *Stacey* v. *R.R. Co.* are full and interesting expositions of the doctrine of the law of the case.

Upon the supposition that the Supreme Court of California made its decision in part because of the law of the case, it follows, as this case now stands, that no proper consideration has been given to the evidence upon which both parties relied to maintain title; and, so far as that Court is concerned, there has been no trial, save the first, which was set aside for error in excluding this very testimony shown in the record here of the second trial. Now when that error had been corrected and the deficiency supplied we were, in effect, told that the record of that testimony at the new trial could not be considered, as the title to the land had been shown to be in the defendant at the first trial, although the only evidence of title at that trial was the U. S. patent title to the plaintiff. Surely there is something anomalous in such a result.

This extended discussion of the law of the case can only be excused by the importance given it in the disposition of this case by the Supreme Court of California.

VIII.

We regret that that Supreme Court did not favor us with its reasons why the testimony at the second trial is "proof of the facts which Doolan offered to prove in his "suit against Carr" (of whatever value, if any, as proof of reservation in this case); that is to say, that the testimony was proof that the tract of land in contest was reserved from the disposing power of Congress at the date of the Act of July 1, 1862, if the Court intended to be so understood.

Unaided, we have been unable to find such proof. It often occurs, as in this case, we think, that there is much testimony, but no proof. The word "proof" as used in the majority opinion is uncertain; it may be construed to mean simply the testimony excluded at the first trial, but admitted at the second; or to mean the effect of the testimony as a conclusion from premises.

The words "proof" and "proved" are oftentimes used synonymously with the words "testimony" and "testified to." A thing testified to is often spoken of as a thing proved.

It is true that the offer of certain testimony at the first trial was rejected and the testimony excluded, but it does not follow that that rejected testimony, subsequently introduced at the new trial, was proof of the reservation of the land in this case, nor because it was proof of the reservation offered to be proved in the Doolan case. Neither is the fact that the suit (*Doolan* v. *Carr*) arose "with reference to the same Mexican grant, Las Pocitas," proof of a res-

ervation in this case. If the Court intended to hold that the land in suit was reserved from the railroad grant, and that it so appeared in the testimony before them, they could have said so.

Whatever be the interpretation of the language, we have no doubt that this matter of reservation of the land in contest will be decided by this Court upon the testimony taken at the second trial, shown in the record here.

Nor do we understand why the Court made reference to *Doolan* v. *Carr* as decisive, it being another case in another Court, where there was, to be sure, the same rejected offer of testimony, the same error, and the same remand, but where, on the second trial, a judgment was again had and in favor of Carr, the plaintiff, on substantially the same testimony as appears in the record here, at which trial all the testimony relative to reservation by reason of the calls for land of this same grant, Las Pocitas, excluded at the first trial, was admitted, from which judgment the defendant in that case, by the same attorney as in this case, took no appeal.

We are aware that the record of the last trial in *Doolan* v. *Carr* is not shown by the record here; neither is that of the first trial, but both are accessible records and may be referred to. If there was anything pertinent or instructive to the Supreme Court of California in *Doolan* v. *Carr*, when its whole history is considered, and which should have controlled its decision in this case, it was that its decision in this case should have conformed to the decision had at the second trial in that case, for the reason that the contention and testimony was substantially the same, and especially so as to the all-important question in both cases, viz., that of reservation of the land in contest from the grant of the railroad company, because of the same Mexican grant, Las Pocitas.

We fail to see what the "offer of testimony" in Doolan v. Carr has to do with the proof in this case.

In view of all the facts in these two cases, we cannot but think that the last decision of the Supreme Court of California was somewhat "criss-cross."

IX.

We also say that the defendant is barred and estopped from defence in this action by reason of his neglect to appeal from the decision of the Register and Receiver of the local land office at San Francisco to the Commissioner of the General Land Office and to the Secretary of the Interior, who were clothed with ample power to correct any wrong done in the local office.

The record shows no such appeal. We cite—

U. S. Revised Statutes, secs. 453, 2478.

Rules 43 and 47 of Rules of Practice before United States District Land Offices.

Witherspoon v. *Duncan*, 4 Wall. 210.

Johnson v. *Towsley*, 13 *Id.* 72.

Poppe v. *Atheam*, 42 Cal. 609.

Hosmer v. *Wallace*, 47 Cal. 469–73.

Hestres v. *Brennan*, 50 Cal. 217.

Vance v. *Kehlberg*, *Id.* 349.

Favrey v. *Lansdale*, Copp's Land Owner, Vol. 4, No. 12.

Brown v. *White*, Copp's Land Laws, Vol. 1, 86.

Weber v. *Western Pacific R.R. Co.*, Copp's Land Owner, Vol. 6, No. 2, 19.

Eaton v. *Cal. & Oregon R.R. Co.*, Copp's Land Owner, Vol. 5, No. 1, 13.

Shuster v. *Grady*, Copp's Land Laws, 314.

In view of the evidence in the record, and the law, we say that the land in contest was not reserved from disposal by the United States at the dates of the Act of Congress of July 1, 1862, and of the patent shown here, but was land disposable by the Government of the United States, and that the patent was valid, and that the decision of the Supreme Court of California affirming the judgment of the Superior Court of Alameda County at the second or new trial is erroneous.

We therefore ask that the decision of the Supreme Court of California be reversed, and that Court be instructed to order the trial Court of Alameda County to vacate its judgment herein made at the second trial, and cause judgment to be entered in favor of plaintiff and against defendant, for a restitution of the land sued for, and for rents and profits as agreed, and accrued costs, and for such other action by this Court as it may deem proper.

Respectfully submitted.

F. H. WATERMAN,
Attorney for Plaintiff in Error.

A. T. BRITTON,
A. B. BROWNE,
of Counsel.